

# H-2B Visas: The Complex Process for Nonagricultural Employers to Hire Guest Workers

Congress and the administration should reform the H-2B program to make it easier to hire and retain H-2B workers.

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Since 1952, American employers have hired H-2B foreign guest workers to fill seasonal or temporary jobs that U.S. workers have not taken. Onerous rules kept participation low until the late 1990s, but as more Americans left these types of temporary jobs, more employers accepted the H-2B visa's restrictive requirements as their only chance to find legal workers.

Now the H-2B program is in crisis. Demand for positions has surged to a level more than twice the visa cap, and many employers fail to fill open positions, which hurts American businesses, consumers, and U.S. workers in other jobs. The process's complexity and uncertainty caused many others not to apply at all, and in 2020, executive orders banning many H-2B workers kept the cap unfilled for the first time in several years.

This study explains the complex process that employers must undertake to have a chance to legally employ foreign workers in jobs that unemployed Americans routinely reject. Congress and the administration should reform the H-2B program to make it easier to hire and retain H-2B workers. President Biden should immediately rescind the visa restrictions put in place by his predecessor.

## Introduction

The H-2B visa allows foreign workers to work in temporary nonagricultural jobs in the United States "if unemployed persons capable of performing such service or labor cannot be found in this country."<sup>1</sup> While the H-2B program has existed for nearly seven decades, it has never faced the problems that it does now. Consecutive administrations have added significantly to the program's costs and complexity, and demand is so far above the cap set by Congress that many businesses are left with unfilled positions, undermining economic growth and incentivizing illegal employment. In December 2020, a presidential proclamation extended a June 2020 ban on many H-2B workers.<sup>2</sup>

This policy analysis details the complicated rules that employers must follow to legally employ foreign workers in jobs that unemployed Americans routinely reject. Its findings include:

- The H-2B program has more than 175 bureaucratically complex rules that inflate labor costs far higher than they would be for most similar U.S. hires.

- H-2B wages have grown at twice the pace of all U.S. wages and exceed every state's minimum wage by an average of 60 percent.
- U.S. workers turned down 93 percent of H-2B job offers in 2020.
- H-2B visas have significantly contributed to a 96 percent reduction in apprehensions of Mexicans crossing the border illegally.

Congress and the administration should reform the H-2B program to make it easier to hire and retain H-2B workers. The administration should allow employers to recruit U.S. workers who will commit to return to a recurring job year after year. If U.S. workers reject the recurring job, H-2B workers should be granted visas that are valid for multiple years without subjecting employers to the onerous H-2B filing process or the H-2B cap. Ultimately, Congress should uncaps the H-2B program just as it has for the farmers' H-2A program because the caps harm both U.S. employers and U.S. workers by keeping seasonal jobs unfilled.

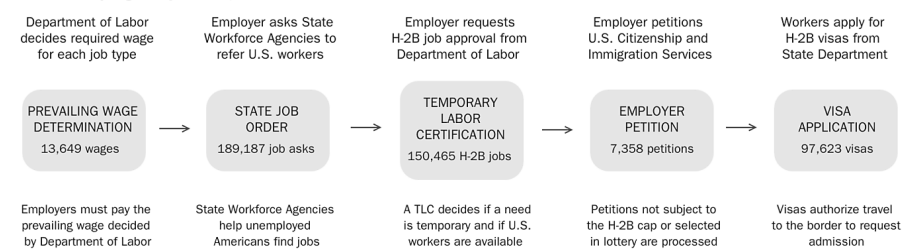
## H-2B Program Rules

An H-2B visa is a nonimmigrant (temporary) visa for foreign workers who plan to work in temporary nonagricultural jobs in the United States “if unemployed persons capable of performing such service or labor cannot be found in this country.”<sup>3</sup> It does not provide for permanent residence or U.S. citizenship. Congress created the H-2 visa program in 1952 with the intent of creating a process for “alleviating labor shortages as they exist or may develop in certain areas or certain branches of American productive enterprises, particularly in periods of intensified production.”<sup>4</sup> In 1986, it relabeled the H-2 nonagricultural program as “H-2B,” thus distinguishing it from the H-2A program for temporary agricultural workers.<sup>5</sup>

In most cases, the jobs that employers use the H-2B program to fill require no formal education, but other than a prohibition on medical school graduates, there are no specific occupational or educational requirements.<sup>6</sup> As an employer-sponsored program, businesses — not workers — initiate the H-2B process, which is lengthy and complex. Figure 1 provides a broad outline of the H-2B process, and Figure 2 provides a detailed path through all the steps for employers and workers in 2019. Appendix Table A provides a list of 176 H-2B rules for workers and employers. These rules do not include the additional requirements for waivers from travel restrictions that were created in 2020 in response to the COVID-19 pandemic and economic downturn.<sup>7</sup> The H-2B statutes enacted by Congress are very brief; it is the agencies that are responsible for creating most of the H-2B rules through regulation.

Figure 1

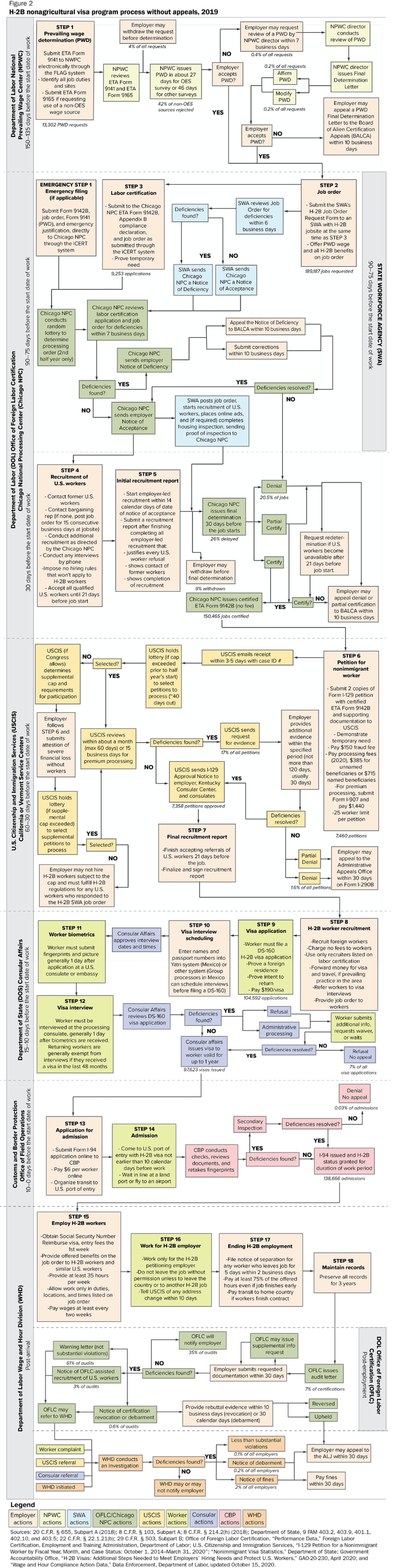
### Basic H-2B program process, FY 2019



Sources: Office of Foreign Labor Certification, “H-2B Selected Statistics,” 2019; U.S. Citizenship and Immigration Services, “Nonimmigrant Worker Petitions”; State Department, “Nonimmigrant Statistics,” 2020; Office of Foreign Labor Certification, “National Prevailing Wage Center-Selected Statistics,” 2020.

In 2008, the Department of Labor (DOL) supported the view that the H-2B program had become “complicated, time-consuming, inefficient, and dependent upon the expenditure of considerable resources by employers,” but the agency has only added more rules since then.<sup>8</sup> In 2014, the Office of the Citizenship and Immigration Services (USCIS) Ombudsman characterized it simply as “highly regulated.”<sup>9</sup> As a result, almost all employers hire attorneys or hiring agents to assist with the H-2B process, at a cost of about \$2,500 to \$4,000 per application, plus per worker fees.<sup>10</sup>







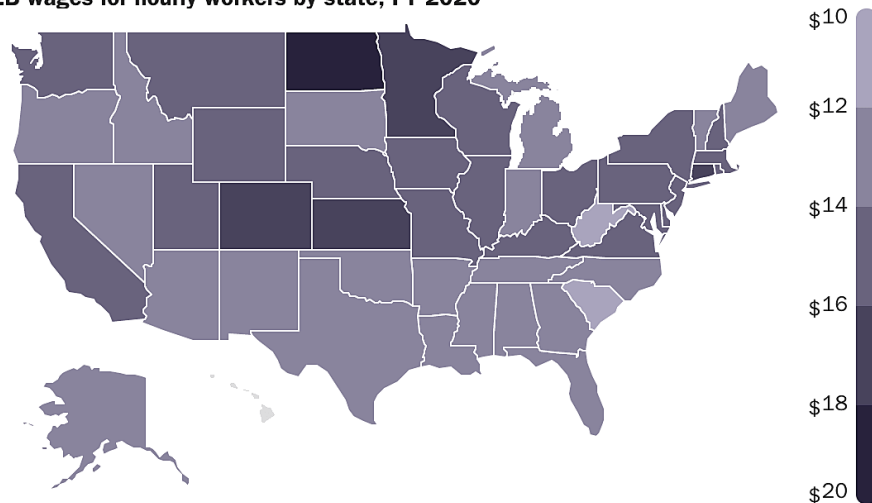
## Prevailing Wage Determination: 130–150 days before job starts

Initially, when employers have jobs that they might need to fill with H-2B workers, they must obtain a temporary labor certification (TLC) from DOL to determine whether or not there are sufficient qualified U.S. workers who will be available and that any employment of H-2B workers will not “adversely affect” the wages and working conditions of similarly employed American workers.<sup>11</sup>

The first step of the certification process is for the employer to predict a worker shortfall and submit a prevailing wage determination (PWD) request to the DOL about 150 days before the job start date (Figure 2, Step 1).<sup>12</sup> For new users, this means learning about the process and usually retaining a hiring agent even earlier. For other users, this means starting the H-2B filing process even while the H-2B workers whom they plan to bring back the next year are still working for them.

The PWD is DOL’s minimum wage rate for H-2B employers and, outside the visa cap, it is the most important, contentious, and expensive rule, causing many employers to drop out of the legal process. In 2020, the average wage for H-2B hourly workers was \$14.09 — nearly double the federal minimum wage of \$7.25.<sup>13</sup> And H-2B wages were higher than every state’s minimum wage by an average of 60 percent.<sup>14</sup> Figure 3 shows the average wage in each state for H-2B hourly workers in 2020.

Figure 3  
**H-2B wages for hourly workers by state, FY 2020**



Source: Office of Foreign Labor Certification, “Performance Data: Disclosure Data,” Foreign Labor Certification, Employment and Training Administration, Department of Labor.

Notes: Fiscal year 2020 through third quarter; hourly wages are weighted by number of hourly workers. Wage data were cleaned by removing five hourly values higher than \$100 and one value below \$7, which would reflect miscoding of the periodicity of pay.

The DOL bases the prevailing wage determination on either the employer’s collective bargaining agreement (i.e., union wages) or the average of U.S. wages within normal commuting distance in the same job category in the Bureau of Labor Statistics’ (BLS) Occupational Employment Statistics (OES) survey or, in 1 percent of cases, another survey that meets DOL’s strict criteria.<sup>15</sup> The stated purpose of this process is to have DOL match the employer’s job duties and locations to the correct OES wage. For unstated reasons, DOL has decided to monitor H-2B employers more closely than it monitors H-1B employers, which may simply look up H-1B high skilled workers’ prevailing wages and skip this process entirely.<sup>16</sup>

In three ways, the PWD raises the H-2B wage higher than the wages of most similar U.S. workers. First, DOL bases the PWD on the mean (average) rather than the median (i.e., the exact midpoint of the wage distribution, with half above and half below).<sup>17</sup> But for 97 percent of OES occupational categories, a few unusually high-paid workers skew the averages to the higher end of the distribution.<sup>18</sup> This means H-2B wages are greater than the wages of a majority of U.S. workers in those jobs. Second, DOL requires that employers pay the highest average wage that could apply in



the area of intended employment — that is, normal commuting distance from any of the job's worksites.<sup>19</sup> Work could be performed solely in one county with a lower average wage, but because DOL deems it within "normal commuting distance" (a phrase with no specific criteria or statutory basis) of a higher-wage county, employers must pay the higher wage.<sup>20</sup>

Third, and most importantly, the PWD fails to consider skill or experience differences within a job category.<sup>21</sup> From 1998 to 2013, DOL provided wage levels (first two, then four) and assigned the PWD's wage level based on the skills or experience that employers required. The agency still provides four wage levels for the H-1B high-skilled visa and permanent visa programs, including for common H-2B job categories, but in 2013 it stopped using skill levels in the H-2B program in order to raise wages.<sup>22</sup> The DOL had previously deemed about three-quarters of H-2B jobs entry level, so by eliminating wage levels, it forced the wages of H-2B workers higher than the wages of the majority of similarly skilled U.S. workers. For instance, in 2020 the PWD for a landscaper in Austin, Texas, was 23 percent higher than the wage for U.S. landscaper's entry level wage in that area.<sup>23</sup>

The PWD is difficult for employers for reasons beyond its cost. Employers must identify all potential job duties and all potential worksites more than five months in advance. This effectively locks workers into the area of normal commuting distance from the jobsite and to a given job category. To understand how tricky this can be, a construction laborer, for example, may operate a cement mixer, but the moment the laborer steps down to smooth the cement, he becomes a cement mason with a higher wage requirement.<sup>24</sup>

While it is possible to obtain multiple PWDs to allow workers to perform multiple job duties at different wages, it is very burdensome to calculate each hour under different rates and keep jobs entirely separate in that manner.<sup>25</sup> Individual workers cannot simply switch between categories throughout the job period as needed. The DOL will also not certify a job that crosses multiple commuting areas, except for forestry and carnival jobs.<sup>26</sup> The PWD requires extensive and constant monitoring by supervisors so that employers do not violate H-2B rules by having workers hired through the H-2B process travel outside the area or take on any new job tasks.

## Job Order and Temporary Labor Certification: 90 days before job start

Between 75 and 90 days before a job starts, employers must submit a job order to a State Workforce Agency — a federally funded state agency that helps unemployed U.S. workers — requesting that it advertise the job at the prevailing wage determination and refer U.S. workers to the job (Figure 2, Step 2).<sup>26</sup> The state agency will ensure that the job order meets H-2B requirements and report any deficiencies to DOL within six business days.<sup>28</sup> All jobs must be "full-time," defined (since 2015) as 35 hours or more per week.<sup>29</sup>

At the same time, the employer will apply for a temporary labor certification to DOL (Step 3) that contains evidence of the employer's temporary need, defined as a "one-time occurrence; a seasonal need; a peakload need; or an intermittent need."<sup>30</sup> A temporary job cannot last longer than 36 months for a one-time need or generally not more than one year for other needs, although the exact length is based on the employer's evidence.<sup>31</sup> If the need is temporary but recurring year-after-year, employers may not seek only workers who will commit to return each season, and DOL will not certify the job for more than the upcoming season.<sup>32</sup> The average H-2B job period was eight months in 2020, with less than one-third of a percent certified for more than one year.<sup>33</sup> The temporary requirement limits the types of H-2B employers more than any other constraint because it rules out all indefinite, year-round positions.

If DOL decides that the need is temporary and that the job order meets the H-2B requirements, it issues a Notice of Acceptance that requires the recruitment of U.S. workers, although H-2B employers will generally have already started advertising the jobs voluntarily.<sup>34</sup> Besides the job order, the employer must try to recruit U.S. workers by at least contacting former employees and posting the job at the jobsite within 14 days of the notice of acceptance (Figure 2, Step 4).<sup>35</sup> The employer must accept all qualified U.S. applicants until 21 days before the job starts.<sup>36</sup> The most prominent difficulty that arises for employers in this recruitment period is that some U.S. workers apply without actually wanting the job.<sup>37</sup> This may happen because, if the state workforce agencies refer U.S. workers who are on unemployment benefits, those workers must generally pursue the opportunity in order to keep receiving their benefits.<sup>38</sup>

Unfortunately, the full scope of this “disingenuous applicant” problem is unclear because DOL does not systematically track how employers ultimately fill their H-2B jobs. A survey of H-2B employers in 2011 — when the unemployment rate was 9 percent — reported that only 6 percent of U.S. applicants for H-2B jobs stayed for the full job period.<sup>39</sup> In a typical example, the Small Business Administration’s Office of Advocacy mentions one Maryland landscaper that advertised 25 H-2B jobs: 25 U.S. workers applied, 3 showed up for interviews, and only 2 lasted more than two weeks on the job.<sup>40</sup> These disingenuous applicants can seriously damage U.S. employers’ recruitment efforts, and the lengthy certification process, combined with the visa cap, makes it nearly impossible to correct. Employers cannot charge any fees to workers to hold the job for them, so employers must accept the full cost of a U.S. worker abandoning a job offer, such as lost productivity and additional recruitment.<sup>41</sup>

After at least 15 business days of posting the job at the jobsite (30 days during the COVID-19 pandemic), employers submit a recruitment report detailing the results of their efforts and requesting the right to hire H-2B workers (Step 5).<sup>42</sup> The DOL tries to process the temporary labor certification at least 30 days before the job starts.<sup>43</sup> As Figure 4 shows, however, DOL routinely misses this processing target. The agency briefly made progress by instituting an expedited review process in 2009 and creating an online application in 2012, but it stopped the expedited reviews in 2015.<sup>44</sup> By 2020, DOL failed to complete 29 percent of TLCs on time.<sup>45</sup> In 2018, a DOL inspector general audit found that the agency “could not demonstrate that it processed H-2B applications so that employers could obtain foreign workers by their date of need” and that its delays “have serious adverse effects on business owners and local economies.”<sup>46</sup>

Figure 4  
**Percentage of timely processed H-2B temporary labor certification applications, FY 2005–2009, 2012–2015, 2017–2020**



Sources: Department of Labor, “Good Jobs for Everyone: FY 2009 Performance and Accountability Report,” [http://www.dol.gov/\\_sec/media/reports/annual2009/2009annualreport.pdf](http://www.dol.gov/_sec/media/reports/annual2009/2009annualreport.pdf); and Office of Foreign Labor Certification, “Performance Data: Selected Statistics by Program,” Foreign Labor Certification, Employment and Training Administration, Department of Labor.

Note: Timeliness from 2005 refers to processing within 60 days. Timeliness from 2012 to 2020 refers to processing at least 30 days prior to job start. The program was briefly closed by court order in fiscal year 2015, causing delays that year prior to the rule change. The Department of Labor doesn’t report timeliness for 2010–2011, the fourth quarter of 2015, and 2016.

The H-2B visa cap significantly affects DOL processing. In 1990, Congress capped the number of H-2B workers who can receive an H-2B visa abroad or status in the United States at 66,000 (starting in 1992).<sup>47</sup> Since 2006, the cap has been equally divided between the two halves of the fiscal year.<sup>48</sup> In recent years, the first-half cap (October to March) has been reached *after* the start of the fiscal year (e.g., in November 2019), but the second-half cap (April to September) has been filled almost immediately *before* the start of the half-year (see Appendix Table B). Almost all employers who are seeking workers subject to the visa cap during April to September list their job



start dates for exactly April 1 so they can get in line first. The earliest that employers may apply to DOL for an April 1 date of need is January 1, so most do that, hoping to bump their petitions to the front of the line.<sup>49</sup> In other words, legal — rather than economic factors — set employer's job start and application filing dates, causing an unnatural rush on a single day. The H-2A program for farmers avoids this problem by not having any cap.

On January 1, 2018, DOL received so many applications that it was slow to issue Notices of Acceptance, delaying the next step in the process. In response, DOL announced that it would certify TLCs in the order that they were filed rather than the date of the recruitment report, stating that it was fairer to preserve the filing order.<sup>50</sup> The next year, at midnight on January 1, 2019, so many employers tried to submit applications that the online filing system crashed for a week, so in 2020, DOL used a lottery to decide the processing order.<sup>51</sup> Temporary labor certifications placed through the lottery toward the back of the processing order simply never had a chance to be approved in time to file a petition before the cap was reached. These delays were also problematic for employers seeking to hire H-2B workers who were not subject to the cap because their workers would arrive late.

The DOL denied 9 percent of all labor certifications in 2019, which is lower than the 15 percent it denied in 2012, but during that time many more employers withdrew their applications before processing — from 0 percent in 2012 to 9 percent in 2020.<sup>52</sup> If DOL has not yet certified a TLC, and the opportunity to apply under the H-2B cap has already passed, employers may withdraw the application to avoid having to pay the PWD to all U.S. workers that they hired. If DOL does process a temporary labor certification and agrees that U.S. workers have not filled all the jobs, it will certify any open jobs, thus allowing employers to recruit and hire H-2B workers, although they must still accept state workforce agency referrals of U.S. workers until 21 days before the job starts.<sup>53</sup>

## U.S. Citizenship and Immigration Services Employer Petition: 30 to 60 days before job start

As soon as DOL certifies a temporary labor certification, employers may submit a petition to USCIS, a component of the Department of Homeland Security, requesting that it admit or grant status to H-2B workers (Figure 2, Step 6). Before substantively reviewing the petition, USCIS will first decide if the requested workers will be subject to the H-2B visa cap and, if so, whether a cap number will be available.<sup>54</sup> The cap applies to workers who are “issued visas or otherwise provided nonimmigrant status” in a single fiscal year, and it counts workers receiving H-2B visas, the first entry by a visa-exempt H-2B worker, and those changing to H-2B status in the United States from another status.<sup>55</sup> The cap excludes workers extending their H-2B status; those previously counted toward that year's cap; those returning to a job under the same visa or approved petition; workers in the territories of the Northern Mariana Islands or Guam; and fish roe processors, technicians, and supervisors (entirely in Alaska).<sup>56</sup>

If USCIS estimates that the cap will be filled based on the number of petitions it receives within the first five business days after employers start applying, the agency conducts yet another lottery (occurring after DOL's lottery) to determine which petitions to process.<sup>57</sup> The lottery selects entire petitions — which include all the workers that an individual employer is seeking — rather than selecting individual beneficiaries from each petition.<sup>58</sup> This means that employers either receive all their workers or none. Unlike the DOL lottery, unselected petitions are simply returned and are not processed later.<sup>59</sup> Employers, however, must still fulfill all the DOL requirements with respect to any U.S. workers hired or referred under the H-2B job order, effectively penalizing the H-2B cap losers.<sup>60</sup>

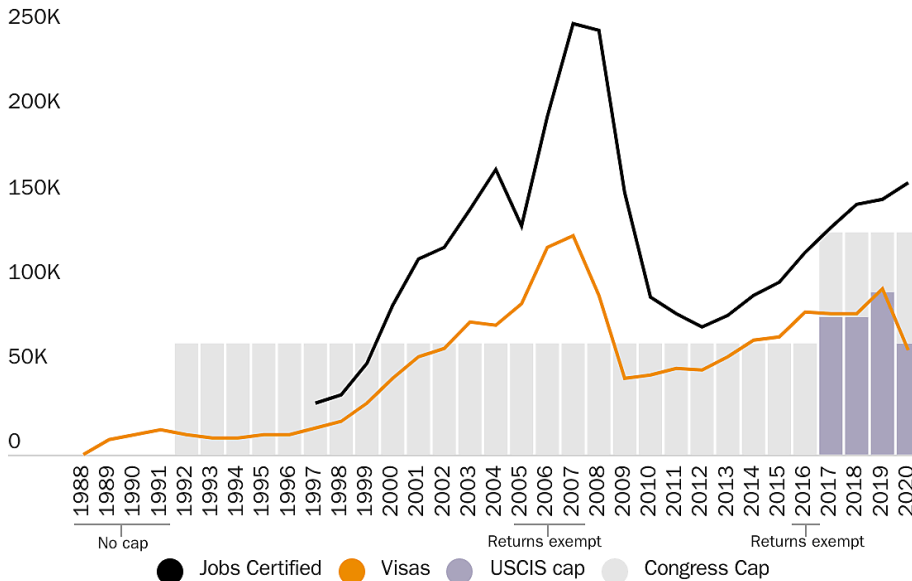
While it has not permanently updated the visa cap, Congress has attempted to alleviate the cap in the years with the highest demand. In May 2005, Congress exempted (from the 2005 and 2006 caps) all returning workers who had counted against the cap in any of the prior three years — a policy that was extended into 2007.<sup>61</sup> Demand subsided below the cap when unemployment spiked following the Great Recession, but after the recovery, employers reached the cap again in 2014 and 2015, prompting Congress to reenact the returning worker exemption in 2016.<sup>62</sup>

For 2017, Congress enacted a temporary provision authorizing USCIS to increase the cap to 130,716 — equal to the most visas and status ever issued in any year (2007) — if it determined that American business needs were unmet.<sup>63</sup> It reenacted this provision for 2018, 2019, and 2020; the administration raised the cap by 15,000 in both 2017 and 2018 and 30,000 in 2019 and restricted the visas only to businesses that would face irreparable harm without workers.<sup>64</sup> For 2019, USCIS

made only returning workers eligible, and in 2020, after initially offering 35,000 more visas, USCIS retracted the offer.<sup>65</sup>

Figure 5 summarizes the changes in program participation and shows that the most growth occurred from 1998 to 2007 (see Appendix Table C for additional data). The cap was first hit in March 2004.<sup>66</sup> As demand grew, Congress waived the cap for returning workers from 2005 to 2007.<sup>67</sup> In recent years, however, USCIS's refusal to increase the cap to the extent authorized by Congress has clearly constrained the program's size. In 2019, DOL certified 150,465 H-2B positions, and the State Department issued 97,623 H-2B visas (just 146 workers changed to H-2B status in the United States in 2019).<sup>68</sup> In 2020, the disparity was even greater.

Figure 5  
**H-2B jobs certified, H-2B visas issued, and H-2B cap, FY 1987–2020**



Sources: "Nonimmigrant Visa Statistics," Department of State; Office of Foreign Labor Certification (OFLC), "Performance Data: Selected Statistics by Program," Foreign Labor Certification, Employment and Training Administration, Department of Labor; OFLC, "Performance Data: Disclosure Data"; OFLC, "Performance Data: Annual Reports," 2020; OFLC, "H-2B Program Data," 2008; and CATA v. Solis, Civil No. 09-CV-240, August 17, 2009. Note: Jobs for 2020 are as of June 30; visas for 2020 are as of July 31; and 1997–1999 jobs are certified estimated based on total H-2B job requests.

Employers selected in the USCIS lottery may later petition for unspecified workers to be specified by name later at a consulate for a fee of \$460.<sup>69</sup> For specifically named workers, the fee is the same even though USCIS must conduct a background check on each worker (unnamed workers receive their background checks at the consulate). Generally, petitions cover all the requested workers.<sup>70</sup> Instead of the standard fees, however, nearly all H-2B employers pay a \$1,500 premium processing fee, which USCIS promises will guarantee processing in 15 business days.<sup>71</sup> Despite this guarantee, the agency can restart the 15-day clock by issuing a Request for Evidence (RFE), thus delaying the timeline, as happened in 17 percent of its 2019 cases.<sup>72</sup>

For unnamed petitions, USCIS only reviews whether the job meets H-2B requirements — mainly whether it is temporary.<sup>73</sup> This process is entirely duplicative of the TLC, and the agency's ombudsman has repeatedly found that USCIS often sends RFEs asking for evidence that was already provided to USCIS or incorrectly asserting that a need may not be temporary if it recurs every year.<sup>74</sup> While USCIS has improved in recent years (see Appendix Table D), these requests are still common, even though the agency denied just 1.6 percent of H-2B petitions in 2019.<sup>75</sup>

## Visas, Admission, and Employment: 0 to 14 days before job starts

If USCIS approves a petition and employers finish accepting U.S. workers, then employers can recruit foreign workers (Figure 2, Step 8). Workers must ordinarily apply for H-2B visas to the State Department at a U.S. consulate or embassy if they are abroad (Step 9). Canadians, as well as



Bahamians and Bermudians, are exempt from the visa requirement.<sup>76</sup> In June 2020, a presidential proclamation suspended the issuance of visas to H-2B workers who had no valid visas in June 2020 unless the workers sought and received waivers showing that they are returning to employers that trained them, or unless the denial would cause their employers hardship.<sup>77</sup> The proclamation is effective until March 31, 2021, but could be renewed.

Each H-2B worker pays a \$190 visa processing fee, which employers must either advance or reimburse within the first week.<sup>78</sup> Usually, consulates must fingerprint and interview each applicant, although these can be waived for workers returning within 24 months.<sup>79</sup> H-2B visas are valid for multiple entries but only for the same period as the petition, necessitating a new visa for each new job if workers return home.<sup>80</sup> If visas were valid for a longer period, fewer workers would count against the H-2B visa cap.

The visa application can also delay workers. In 2020, consular officers refused 19 percent of H-2B visa applicants, but after the applicants submitted additional evidence the final refusal rate fell to 10 percent.<sup>81</sup> These rates have fallen from highs of 44 and 25 percent, respectively, in 2009 (see Appendix Table E). The State Department does not publish specific reasons for these refusals,<sup>82</sup> but the primary purpose of the visa process is to prove “nonimmigrant intent” — that is, proof of strong ties to the worker’s home country that would motivate the worker to return home — so this requirement likely accounts for most denials.<sup>83</sup>

However, other issues can arise. The USCIS ombudsman reported a case where, in 2012, a consular official initially rejected workers because he felt that they could not adequately explain their job duties, thus risking \$1 million in contracts for a U.S. landscaper, until the ombudsman intervened.<sup>84</sup> The ombudsman has said that “delays at any point in [the H-2B] process can have severe economic consequences for U.S. employers.”<sup>85</sup> Unfortunately, the federal government does not track how often guest workers arrive after the start date.<sup>86</sup>

Visas authorize travel to the U.S. border, where Customs and Border Protection (CBP), another agency within the Department of Homeland Security, screens workers and grants them admission (Figure 2, Step 14). Workers receive an entry document (I-94) authorizing their H-2B status for the job’s duration, plus up to 10 days to travel to the job and 10 days to travel back home or find a new job.<sup>87</sup> Importantly, the fact that the regulation entirely ties the length of status to the TLC’s job length ensures that all returning workers who leave the United States are counted against the cap every year whenever they return under a new petition.<sup>88</sup> CBP charges an entry fee of \$6 per worker, which employers must repay, and workers often wait in line several hours to enter the country.<sup>89</sup>

When workers do start, employers must guarantee that they will pay three quarters of all hours offered at the prevailing wage determination for three-quarters of every 12-week period of the job at 35 hours per week — even if the job finishes early — to both H-2B and U.S. workers in “corresponding employment.”<sup>90</sup> Objecting to these requirements, Congress has repeatedly prohibited DOL from using funds in each congressional appropriations law that it has passed since 2015 to enforce both the “three quarters guarantee” (for all workers) and the “corresponding employment rule” (for U.S. workers not hired through the H-2B job order process).<sup>91</sup> Should Congress allow DOL to enforce the rules, the agency claims that it will target employers for violations in prior years.<sup>92</sup>

Beyond the prevailing wage determination, these requirements are the most complex and expensive of H-2B’s major rules (see Text Box 1). The three-quarters guarantee imposes significant risk for employers if a job completes early or cannot start on time, which is very difficult to predict months in advance. Commenting on this rule, the Small Business Administration’s Office of Advocacy noted, for example, that “forestry contractors cannot schedule tree planting in advance because the weather changes for weeks at a time — the ground can be too hot, too frozen, too wet or too dry to plant.”<sup>93</sup> Because all jobs on a temporary labor certification must occur during the exact same period, employers also cannot stagger the entry of H-2B workers as they ramp up operations. Seafood employers can use staggered entries but only because Congress forced DOL to allow them to.<sup>94</sup>

TEXT BOX 1: MAJOR H-2B RULES

- **Eligibility:** Full-time nonfarm jobs lasting no more than one year or three years for a one-time need
- **Corresponding employment rule:** U.S. workers receive same benefits as H-2B workers
- **Prevailing Wage Determination (PWD):** H-2B minimum wage based on local averages that exclude skill differences
- **Three-quarters guarantee:** pay at least 75 per- cent of offered wages in each 12-week period
- **H-2B cap:** An annual limit of 66,000 on H-2B visas or status
- **Housing:** provide and pay for housing for mobile workforces (forestry, carnivals, etc.)
- **Job Order:** A request for U.S. workers from a State Workforce Agency
- **Transportation:** Cover daily transit to and from home country or state
- **Temporary Labor Certification (TLC):** Prove temporary need, recruit U.S. workers
- **Meals:** Workers must receive three meals per day during transit from abroad
- **Recruitment report:** Document job offers to past U.S. employees, posting of job offer, inter- views with U.S. workers
- **Three-year limit:** H-2A workers transferring be- tween U.S. farms must return for 90 days after three years
- **Visa:** Workers must receive a visa from a consul- ate to travel to a U.S. port of entry
- **Fees:** \$150 Fraud Fee; \$460 per petition; \$1,500 for 15-day premium processing; \$190 per visa; \$6 per admission
- **Petition:** Employers must petition to request worker entry to the United States

Source: See Appendix Table A for a full list of 176 rules.

Because the guarantee applies to each 12-week period (cut to 6 weeks if the job period is less than 120 days), it is less flexible than a similar H-2A rule for farmers, which applies to the entire job period and so allows farmers to make up missed hours during peak periods.<sup>95</sup> If employers fail to report within two days when both H-2B and corresponding U.S. workers leave the job, the employers must pay the workers for the time that they were originally scheduled to work, even if the workers left on their own.<sup>96</sup> The guarantee necessitates very close monitoring of what hours were offered, why hours were not worked, and what hours were worked in every 12-week period for every worker — burdensome tracking for small employers.<sup>97</sup>

The corresponding employment rule is the second most expensive H-2B requirement after the prevailing wage determination because it imposes the H-2B program's major costs on the entire workforce in the area, mandating the inflated PWD and benefits to nearly all similar U.S. employees.<sup>98</sup> For employers where the H-2B workers would represent, for example, half the workers in a job category, this rule doubles the PWD's cost. The rule is also exceptionally burdensome for employers that would typically have employees performing a shifting array of tasks throughout the year, so identifying who qualifies as a "corresponding" worker is difficult. As soon as they employ H-2B workers, the employers must carefully monitor their tasks to guarantee that they avoid inadvertently becoming a "corresponding" worker.<sup>99</sup>

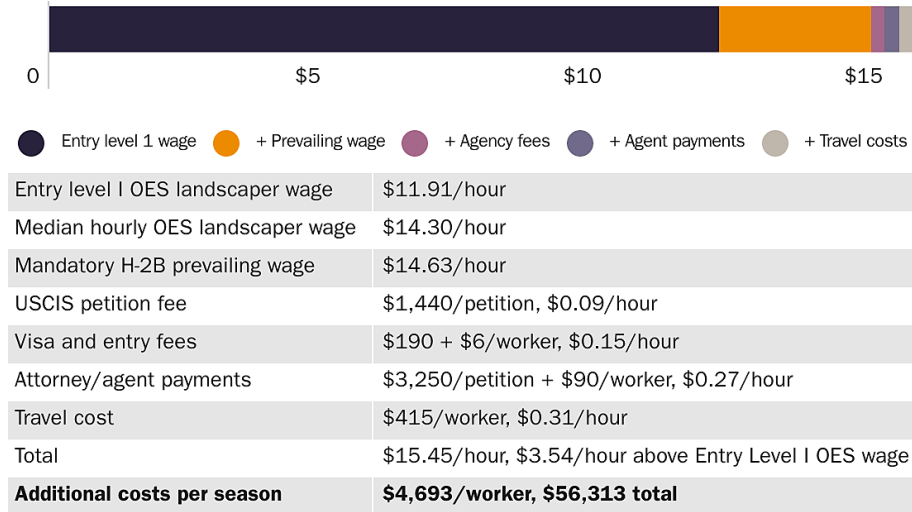
Since 2015, employers of itinerant H-2B workers (mostly in forestry and carnivals) have had to provide housing at no cost to the workers.<sup>100</sup> For forestry and carnivals, this is the biggest burden other than the prevailing wage determination because it raises their compensation even further above the pay for U.S. workers not hired through the H-2B process, where free housing is rarely provided. After workers complete 50 percent of a job, employers must reimburse their expenses for travel to the jobsite and, if workers complete the job, pay for the trip back to their home unless workers find other H-2B jobs.<sup>101</sup> Again, employers must do this for both H-2B and U.S. workers



because all H-2B benefits on the job order must be offered to U.S. workers. Employers must calculate the market rates for bus or air fare, lodging, and meals for each day, including those days spent traveling to and staying in the city with the U.S. embassy or consulate waiting for visa approvals.

The travel costs are also a significant added expense of the H-2B program. Figure 6 summarizes a rough calculation of the typical, added cost for an H-2B employer in Austin, Texas — the city with the most H-2B jobs. Because the PWD is based on the local wage, it is important to make these comparisons at a local, rather than national, level.

Figure 6  
**Costs for 12 entry level H-2B landscapers in Austin, Texas, 2019**



Sources: Office of Foreign Labor Certification, "Wage Library," 2020; "May 2019 Metropolitan and Nonmetropolitan Area Occupational Employment and Wage Estimates: Austin-Round Rock, Texas," Occupational Employment Statistics, Bureau of Labor Statistics, last modified March 31, 2020; "Myths vs Facts," Seasonal Employment Alliance, 2019; Governmental Accountability Office, "H-2B Visas: Additional Steps Needed to Meet Employers' Hiring Needs and Protect U.S. Workers," GAO-20-230, April 2020; Office of Foreign Labor Certification, "Performance Data: Disclosure Data," Foreign Labor Certification, Employment and Training Administration, Department of Labor.

Notes: OES = Occupational Employment Statistics. Hours worked were estimated based on the median number of times that H-2B workers were approved on a petition and the average weeks offered on a temporary labor certification times 40 hours.

After the job ends, employers must maintain records for three years and cooperate with audits and investigations to avoid fines and debarment from the program.<sup>102</sup> The H-2B program has two overlapping enforcement processes.<sup>103</sup> First, DOL's Office of Foreign Labor Certification (OFLC) — the same DOL component that adjudicates the temporary labor certification — conducts random audits of H-2B employers at a rate of about 7 percent annually.<sup>104</sup> OFLC reviews employer documents and can require additional recruitment measures or debar employers.<sup>105</sup> Most H-2B employers are small businesses with limited human resources staff, making random audits without any alleged violations a burdensome exercise.<sup>106</sup>

Second, DOL's Wage and Hour Division (WHD) may independently conduct investigations based on complaints, prior violations, referrals from other agencies (including OFLC), or other reasons, such as fraud trends.<sup>107</sup> An investigation is typically lengthier and more intrusive than an audit, involving onsite visits and interviews with employees.<sup>108</sup> The division may assess civil monetary penalties for violations that are willful and for substantial failures to follow H-2B rules.<sup>109</sup> It may also order backpay to both U.S. and H-2B workers or debar employers for up to five years.<sup>110</sup>

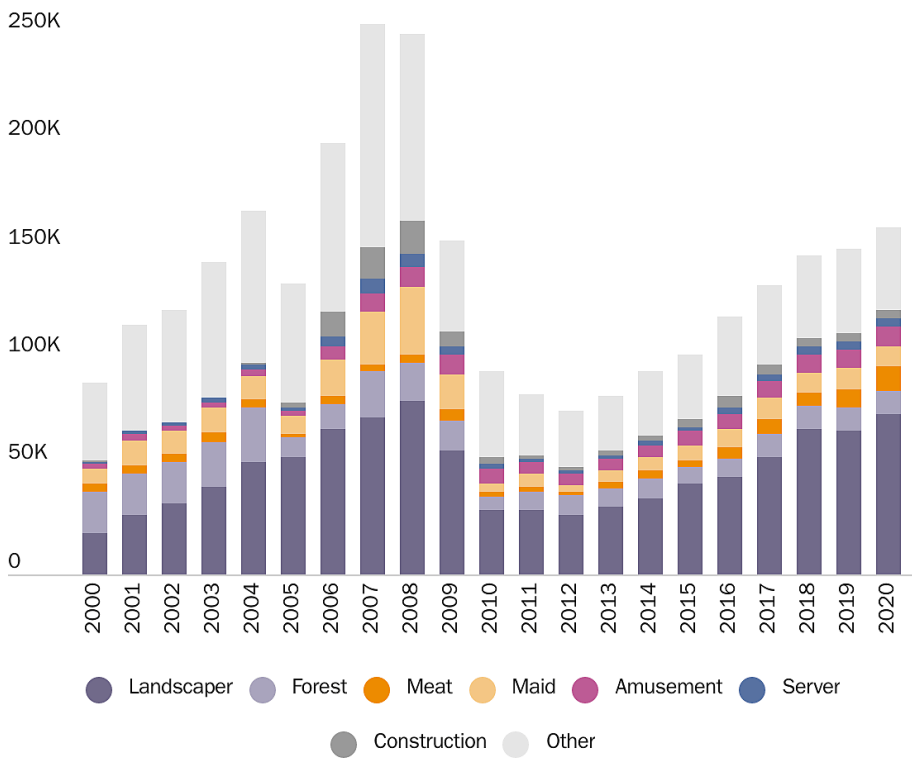
After their jobs end, regulations require H-2B workers to find another employer within 10 days or return home.<sup>111</sup> The rules also mandate absences of at least three continuous months for every three continuous years of status (except during the COVID-19 pandemic for workers in food processing).<sup>112</sup> In 2015, DHS assumed that half of H-2B workers extended their stays for at least one year and a quarter of workers extended their stays for three years.<sup>113</sup> This suggests a total H-2B population of 160,410 in 2019.<sup>114</sup>

# Employers and the H-2B Program

The DOL has recently stated that “H-2B workers play a vital role in the U.S. economy by reducing the negative economic impact of labor shortages in several important industries.”<sup>115</sup> The significant expenses and uncertainty about the availability of visas, however, limit the H-2B program only to employers with significant needs for temporary labor that can be predicted very far in advance. In 2019, about 6,222 U.S. employers submitted H-2B temporary labor certification applications — less than 1 percent of all U.S. employers — and only about half of those received approved petitions for cap-subject nonimmigrant workers.<sup>116</sup> Without knowing exactly how often the cap prevents employers from filling H-2B jobs, it is difficult to assess the full economic effect of the H-2B program, but in 2019 employers offered these workers total wages of about \$4.7 billion.<sup>117</sup>

Figure 7 shows the number of DOL-certified jobs by job type for fiscal years 2000 to 2020. In 2020, the agency certified H-2B jobs under 196 job codes, but seven categories dominated the program. Of the 2020 H-2B jobs, 46 percent were for landscapers, 7 percent for forestry workers, 7 percent for meat and seafood cutters and trimmers, 6 percent for maids, 6 percent for amusement attendants, 2 percent for servers, 2 percent for construction workers, and 24 percent for all other jobs.

Figure 7  
**H-2B jobs certified by occupation, FY 2000–2020**



Sources: “Nonimmigrant Visa Statistics,” Department of State; Office of Foreign Labor Certification (OFLC), “Performance Data: Disclosure Data,” Foreign Labor Certification, Employment and Training Administration, Department of Labor; and OFLC, “H-2B Program Data,” 2007.  
 Notes: Data from 2020 are as of the third quarter. The occupations are from the Standard Occupational Classification (SOC) System categories: Landscaping and Groundskeeping Workers 37-3011; Forest and Conservation Workers 45-4011; Maids and Housekeeping Cleaners 37-2012; Meat, Poultry, and Fish Cutters and Trimmers 51-3022; Amusement and Recreation Attendants 39-3091; Waiters and Waitresses 35-3031; and Construction Laborers 47-2061. The Department of Labor has only used SOC exclusively since 2013, so crosswalks were used for prior years.

Table 1 shows the top industries for H-2B certified jobs in all of 2019 and the top job within those industries compared with the U.S. totals for a single month in 2019. These statistics are not perfectly comparable because only about 82 percent of H-2B jobs occur in the month of May.



Nonetheless, these are the best statistics available to contextualize H-2B's importance within each industry and category.

Table 1  
**Top industries for H-2B certified jobs, top H-2B job within industry, and all U.S. jobs, 2019**

| Industry and top job in industry                               | H-2B jobs (all 2019) | All jobs (May 2019) | H-2B 2019 percentage of all May 2019 |
|--|----------------------|---------------------|--------------------------------------|
| Services to buildings and dwellings                            | 65,989               | 2,191,760           | 3%                                   |
| <i>-Industry's top job: landscaping/groundskeeping</i>         | 61,583               | 560,710             | 11%                                  |
| Travel accommodations (hotels)                                 | 15,546               | 2,053,410           | 1%                                   |
| <i>-Industry's top job: maids and household cleaners</i>       | 6,870                | 467,270             | 1%                                   |
| Amusement and recreation                                       | 15,324               | 1,349,720           | 1%                                   |
| <i>-Industry's top job: amusement/recreation attendants</i>    | 6,250                | 168,990             | 4%                                   |
| Support activities for forestry                                | 10,983               | 13,363*             | 82%*                                 |
| <i>-Industry's top job: forest and conservation workers</i>    | 10,953               | *                   | *                                    |
| Seafood product preparation and packaging                      | 8,773                | 31,670              | 28%                                  |
| <i>-Industry's top job: meat-poultry-fish cutters/trimmers</i> | 7,263                | 9,440               | 77%                                  |
| Contractors: foundation, structure, and building exterior      | 4,895                | 936,030             | 1%                                   |
| <i>-Industry's top job: construction laborers</i>              | 1,551                | 119,370             | 1%                                   |
| Spectator Sports   | 2,004                | 146,980             | 1%                                   |
| <i>-Industry's top job: nonfarm-animal caretakers</i>          | 1,956                | 7,070               | 28%                                  |

Sources: Office of Foreign Labor Certification, "Performance Data: Disclosure Data," Foreign Labor Certification, Employment and Training Administration, Department of Labor; "Occupational Employment Statistics: OES Data," Bureau of Labor Statistics, May 2019; American Community Survey, 1-Year Estimates—Public Use Microdata Sample, 2018; and "County Business Patterns: 2018," Census Bureau, June 25, 2020.

\*Notes: All jobs figures are from the Occupational Employment Statistics (OES) except for support activities for forestry because the OES doesn't sample the industry. The table uses the County Business Patterns data for the overall employment figure. Point-in-time estimates are not directly comparable to all year-round hires.

The industry most dependent on H-2B workers is the industry "Support Activities for Forestry," where H-2B certified jobs for forestry and conservation workers in 2019 accounted for about 82 percent of the industry.<sup>118</sup> The seafood industry is also almost entirely dependent on H-2B workers as its cutters and trimmers. H-2B jobs account for nearly a quarter of animal caretaker jobs in the spectator sports industry (mainly horse racing). At 11 percent of the jobs in the industry, landscapers play as significant a role in the services to buildings and dwellings industry as H-2A temporary foreign workers do on U.S. farms.<sup>119</sup> While not highly represented in the amusement industry overall, H-2B amusement attendants are important at traveling carnivals and fairs, and construction laborers and maids often fill niches in resort towns or sparsely populated parts of the country.

In other industries, H-2B visas can play a very small role for a variety of reasons besides limited employer needs. The building construction industries, for instance, employ three times as many workers as landscaping; however, they hire almost no H-2B workers, possibly because they have trouble meeting certain specific requirements like predicting the number of workers needed months in advance.<sup>120</sup>

Table 2 shows the distribution of H-2B certified jobs by state in 2019. In absolute terms, Texas led the way with 18,741 (12 percent of the total), followed by Florida, Colorado, North Carolina, and Pennsylvania. Landscaping was the top job in these states. In relative terms, however, the territory of the Northern Mariana Islands was by far the most dependent on H-2B jobs, which accounted for nearly 9 percent of its jobs — with cement masonry being most common — partly because

Congress waived both the H-2B cap for the territory and the requirement that a job be temporary if it is related to military facility construction or health care.<sup>121</sup>

Table 2

**H-2B certified jobs by state, H-2B jobs per 100,000 state jobs, and top state job, 2019**

| Top states (by total H-2B jobs) | H-2B jobs | H-2B jobs per 100,000 state jobs | Top job         | Top job numbers | Top states (by % state jobs) | H-2B jobs | H-2B jobs per 100,000 state jobs | Top job         | Top job numbers |
|---------------------------------|-----------|----------------------------------|-----------------|-----------------|------------------------------|-----------|----------------------------------|-----------------|-----------------|
| Texas                           | 18,741    | 138                              | Landscaping     | 11,607          | Northern Mariana Islands     | 2,648     | 8,827                            | Cement masons   | 600             |
| Florida                         | 11,313    | 113                              | Landscaping     | 2,146           | Alaska                       | 5,039     | 1,544                            | Fish processing | 4,578           |
| Colorado                        | 7,896     | 258                              | Landscaping     | 4,998           | Maine                        | 2,342     | 349                              | Maids           | 929             |
| North Carolina                  | 5,840     | 120                              | Landscaping     | 2,914           | Mississippi                  | 3,979     | 330                              | Forestry        | 1,632           |
| Pennsylvania                    | 5,837     | 94                               | Landscaping     | 3,827           | Louisiana                    | 5,593     | 281                              | Landscaping     | 2,022           |
| Louisiana                       | 5,593     | 281                              | Landscaping     | 2,022           | South Dakota                 | 1,195     | 266                              | Maids           | 268             |
| Alaska                          | 5,039     | 1,544                            | Fish processing | 4,578           | Colorado                     | 7,896     | 258                              | Landscaping     | 4,998           |
| Virginia                        | 4,653     | 108                              | Landscaping     | 2,671           | Wyoming                      | 621       | 220                              | Maids           | 308             |
| New York                        | 4,645     | 51                               | Landscaping     | 1,783           | Idaho                        | 1,803     | 210                              | Forestry        | 862             |
| South Carolina                  | 4,215     | 182                              | Landscaping     | 1,482           | Utah                         | 3,272     | 209                              | Landscaping     | 2,107           |

Sources: Office of Foreign Labor Certification, "Performance Data: Disclosure Data," Foreign Labor Certification, Employment and Training Administration, Department of Labor; "Table 1. Civilian Labor Force and Unemployment by State and Selected Area, Seasonally Adjusted," Economic News Release, Bureau of Labor Statistics, last modified November 25, 2020; and Government Accountability Office, "Commonwealth of the Northern Mariana Islands: Implementation of Federal Minimum Wage and Immigration Laws," GAO-17-437, May 2017.  
Notes: State jobs reflect July 2019 totals. H-2B jobs reflect total certified jobs in fiscal year 2019. All jobs are from the Bureau of Labor Statistics except for the Northern Mariana Islands.

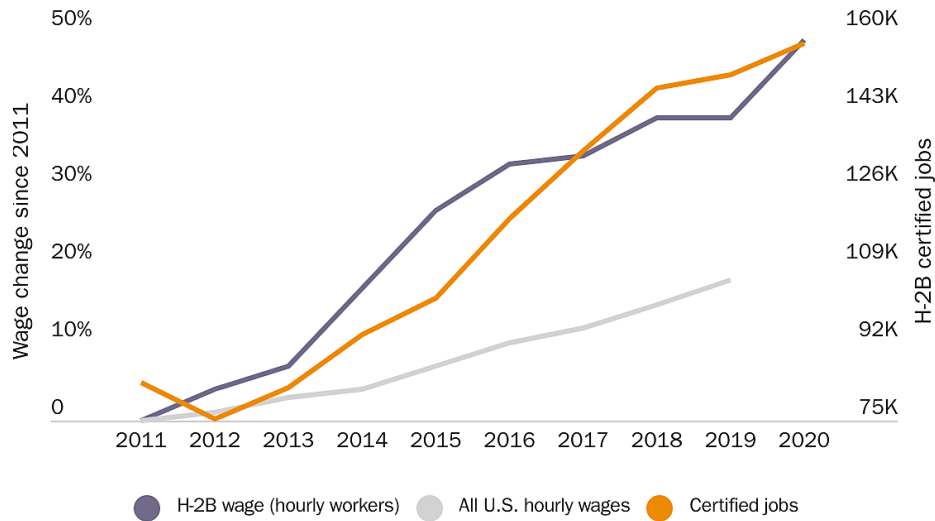
Alaska was by far the state most dependent on H-2B jobs, with 1,544 H-2B jobs per 100,000 jobs in the state. These were almost entirely in fish-related industries, which have benefited from a cap exemption for fish roe processing.<sup>122</sup> Maine (maids); Mississippi (forestry); Louisiana (landscaping); and South Dakota (maids) followed, with between 266 and 349 H-2B jobs per 100,000 jobs. The least dependent states were Hawaii, Connecticut, California, Nevada, and Wisconsin, with fewer than 20 H-2B jobs per 100,000 jobs.

Employers only use the H-2B program because they cannot find willing U.S. workers at the prevailing wage. Given this fact, the industries and locations of H-2B workers make sense. Several states or territories with small populations are the most dependent on H-2B workers because U.S. workers are least available there. H-2B maids typically service remote locations such as Cape Cod or national parks during the relatively brief and intense summer seasons.<sup>123</sup> H-2B workers are also critical to traveling carnivals, where the jobs move from county to county.<sup>124</sup> Similarly, forestry jobs require employees to work in a series of remote locations in extreme weather conditions, separated from family for months at a time.<sup>125</sup> The Bureau of Labor Statistics states that forestry jobs are "physically demanding" and have "one of the highest rates of injuries and illnesses of all occupations."<sup>126</sup> Similarly, landscaping, fish roe processing, and crab picking can be physically taxing jobs with less favorable conditions than the ones that Americans generally fill. U.S. workers sometimes relocate to remote areas for work and often perform physically taxing work, but they appear far less likely to do so when the job will provide only a short, temporary period of employment.

H-2B certified jobs have not attracted U.S. workers, despite DOL rapidly raising the prevailing wage since 2011. The average wage for hourly H-2B workers rose by 39 percent from 2011 to 2019 — more than twice the increase in the average hourly wage for all U.S. jobs (18 percent) — yet DOL certified about twice as many jobs in 2019 as it did in 2011 (Figure 8), indicating that too few U.S. workers applied for those jobs. These wage increases partly reflect stricter prevailing wage determination rules in 2013 and 2015, but also faster-than-normal wage growth in all the top 10 H-2B job categories, particularly landscaping (see Appendix Table F).

Figure 8

**H-2B certified jobs, change in average wage for H-2B hourly workers and all U.S. workers from 2011 through the third quarter of 2020**



Sources: Office of Foreign Labor Certification, "Performance Data: Disclosure Data," Foreign Labor Certification, Employment and Training Administration, Department of Labor; and "Occupational Employment Statistics: OES Data," Bureau of Labor Statistics, May 2019.

Notes: The H-2B average wage is weighted by the number of certified workers with an hourly wage. Fiscal year 2020 is only through the third quarter.

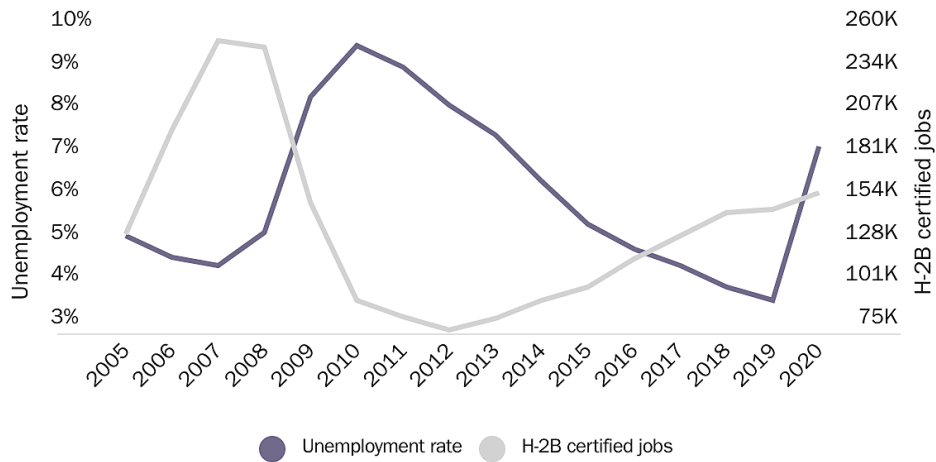
The unemployment rate in the top H-2B jobs is almost always higher than the national average because these jobs are inherently temporary, so workers face more periods of unemployment, but those periods are shorter than they are for other workers.<sup>127</sup> In 2019, the average length of unemployment for all workers was about 20 weeks, while the average for landscapers and construction was fewer than 14, maids fewer than 13, servers fewer than 10, and meat processors fewer than 5.<sup>128</sup> Workers in temporary jobs are more likely to be unemployed at any given time, but employers snatch them off the market much faster, so it is common for workers to be unemployed but unavailable due to other commitments. Workers seeking temporary jobs often commit to another job soon after their present job concludes. This means that unemployment in temporary jobs indicates something entirely different from unemployment in other jobs, making it an unreliable gauge of labor market tightness.

Except for the highly anomalous year of 2020, the number of DOL certified jobs has generally tracked the national unemployment rate for the last 15 years (Figure 9), indicating that H-2B demand does respond to looser labor markets.<sup>129</sup> The GAO has found that counties with H-2B employers also had lower unemployment rates than other counties in every quarter from 2015 to 2018, as well as 15 percent higher wages.<sup>130</sup> These findings are consistent with other, more sophisticated statistical research.<sup>131</sup>



Figure 9

**H-2B certified jobs and U.S. unemployment rate, FY 2005 through the third quarter of 2020**



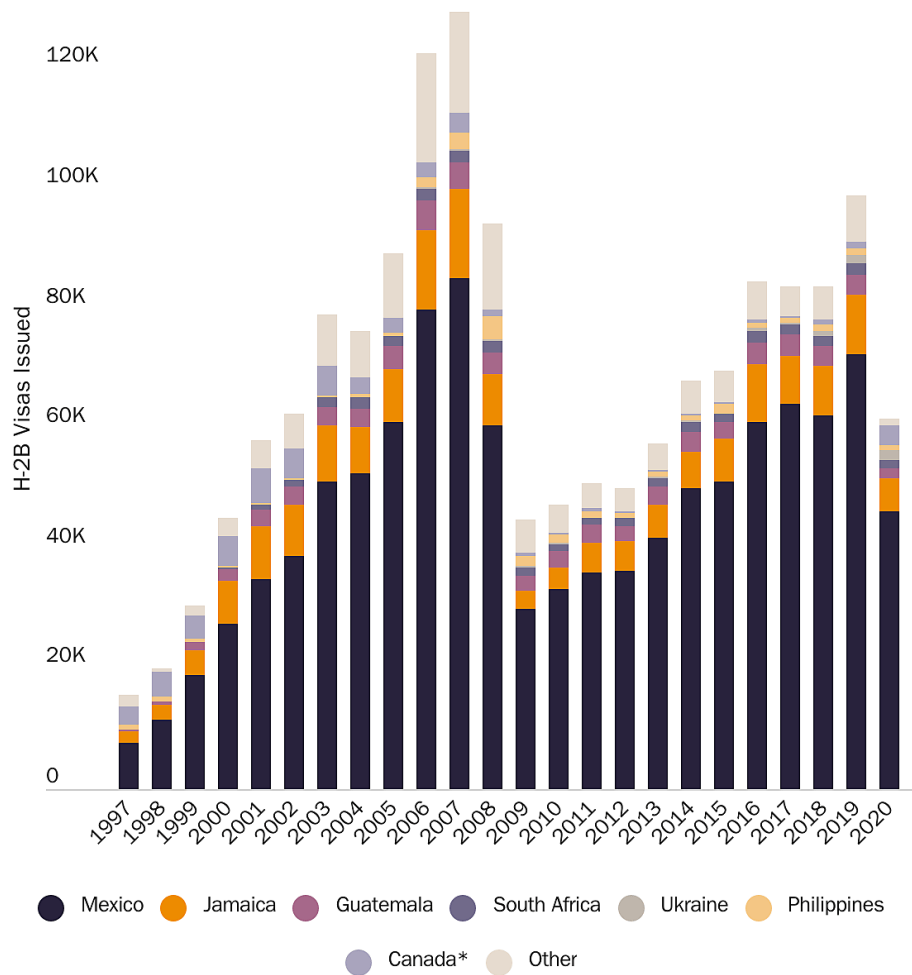
Sources: Office of Foreign Labor Certification, “[Performance Data: Disclosure Data](#),” Foreign Labor Certification, Employment and Training Administration, Department of Labor; “[Occupational Employment Statistics: OES Data](#),” Bureau of Labor Statistics, May 2019; and “[Databases, Tables & Calculators by Subject: Unemployment](#),” 2020. Notes: The unemployment rate is the average for the fiscal year; FY 2020 is only from October to June. Note that 96 percent of H-2B jobs were certified before April 2020, when U.S. unemployment spiked.

While employers do generally request fewer workers when unemployment is high, the rate at which U.S. workers apply for the H-2B jobs that are offered hardly changes (see Figure 16 below). Unemployment peaked in fiscal year 2010, and H-2B job requests plummeted, but DOL still certified 83 percent of jobs as unfilled by U.S. workers in that year as opposed to 86 percent in 2019 with a historically low unemployment rate.<sup>132</sup> Employers only go through the H-2B process when they are confident that they will not find U.S. workers.

## Foreign Workers and the H-2B Program

USCIS restricts H-2B visas to nationals of 81 countries (companies must justify any exceptions based on unusual skillsets), and nationals of 74 countries participated in 2018 and 2019. Mexicans dominate the flow (Figure 10), with the Mexican share of visas increasing from 49 to 74 percent between 1997 and 2019. The next most common nationality in 2019 was Jamaican (10 percent), followed by Guatemalan (3 percent), and South African (2 percent). All other nationalities amounted to about 12 percent—a majority of which were from Eastern European countries such as Romania, Serbia, and Ukraine.

Figure 10  
**H-2B visas issued by nationality, FY 1997–2020**



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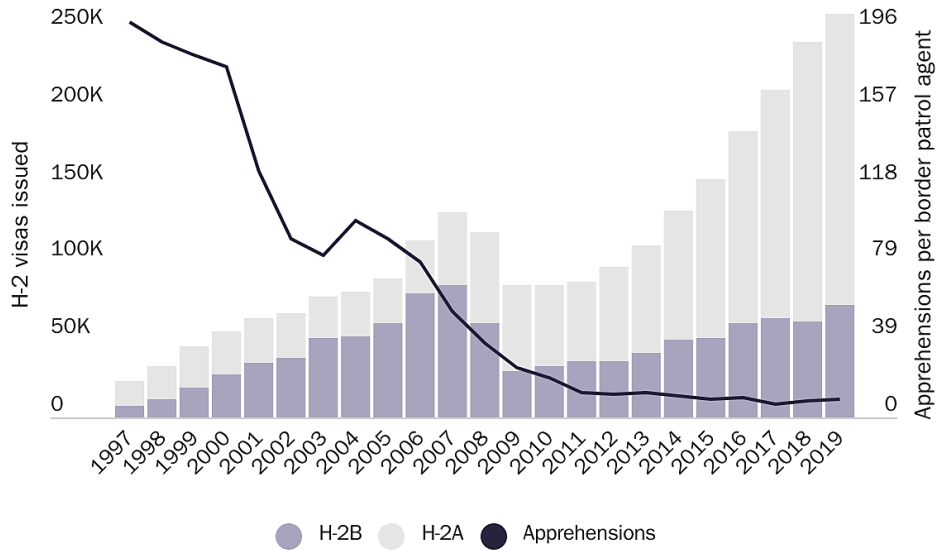
Sources: “Nonimmigrant Visa Statistics,” Department of State; “Reports and Studies—USCIS Program Reports: H-2B,” U.S. Citizenship and Immigration Services, 2020; Department of Homeland Security, *Yearbook of Immigration Statistics* (Washington: Department of Homeland Security, 1997–2004); and 85 Fed. Reg. 3067 (January 17, 2020).

\*Note: Canadians are visa exempt, so the Canadian numbers refer to admissions that count individuals multiple times during each crossing.

Since illegal workers also often seek jobs in common H-2B categories, it makes sense that the increase in Mexican H-2B workers has corresponded with a decrease in the number of illegal crossings by Mexicans. In 2019, each Border Patrol agent averaged 96 percent fewer apprehensions of Mexicans than in 1997, while the number of H-2B and H-2A visas for Mexicans increased elevenfold (Figure 11).<sup>133</sup> Fewer illegal crossers fed the demand for more legal workers, and more legal workers led to even fewer illegal crossings—two mutually reinforcing trends. A 1 percent increase in H-2 visas for Mexicans—including those under the H-2B program for nonagricultural jobs and the H-2A program for farm jobs—was associated with a 1 percent decline in the absolute number of Mexicans apprehended for crossing illegally.<sup>134</sup> As one H-2 worker said in April 2019, “Most of my friends go with visas or they don’t go at all.”<sup>135</sup>

Figure 11

**H-2B and H-2A visas issued to Mexicans and Mexicans apprehended per border patrol agent, FY 1997–2019**



[Download data](#)

Sources: “Nonimmigrant Visa Statistics,” Department of State; Border Patrol, “Nationwide Illegal Alien Apprehensions Fiscal Years 1925–2018,” Customs and Border Protection, Department of Homeland Security; and Border Patrol, “Border Patrol Agent Nationwide Staffing by Fiscal Year,” March 2019.

Workers cannot apply directly for H-2B visas. Businesses petition USCIS for foreign workers before workers receive visas, so employers ultimately control which countries the workers come from. As H-2B employer requests grew, U.S. businesses simply expanded their existing recruitment in Mexico.<sup>136</sup> If Congress wants to encourage the hiring of other nationalities that are prone to making illegal border crossings—such as Hondurans, Guatemalans, and Salvadorans—it needs to expand the program but restrict hiring only to those specific countries, thus forcing employers to recruit in those countries.<sup>137</sup> The DHS initially set aside 10,000 visas from the 2020 H-2B supplemental cap increase for workers from Honduras, Guatemala, and El Salvador before it decided to cancel the cap increase entirely.<sup>138</sup>

Higher U.S. wages and benefits motivate workers to accept U.S. jobs (see Text Box 2).<sup>139</sup> The average wage for hourly H-2B workers was \$14.09 per hour in 2020, while the minimum wage in Mexico, for example, was just \$4.64 *per day*—less than \$1,200 per year.<sup>140</sup> About 85 percent of H-2B workers are men.<sup>141</sup> Their spouses and minor children qualify for dependent H-4 visas, but since family members must pay all their own expenses and USCIS prohibits them from working legally, nearly all workers leave their spouses and children at home. This separation creates significant hardship for guest worker families, which USCIS could prevent in some cases by authorizing spouses or older children to work.



#### TEXT BOX 2: THE U.S. EXPERIENCE FOR H-2B WORKERS

"H-2B's a huge help. It's what we Mexicans call 'the American dream,'" said Gallegos Alvarez, a Colorado horse caretaker from Mexico who worked in 2018. "I have felt very at ease working here I had hoped to further my family, create a home, build a house, and here I have succeeded," said José Luis Cruz, a Pennsylvania landscaper who worked in 2019.

Behind every one of us, there are little ones who depend on us, emotionally as well as economically. We live half our lives over there and half our lives over here," said Adalberto Espinoza, a Colorado landscaper and father of three who worked in 2017. "I don't mind because the smell of crabs is the smell of money," said Martha Olivares Garcia, who used the money she earned picking crabs in Maryland in 2019 to pay for her child's education.

"I'm not here to take anyone's job I look at my hands and they're bleeding, they're hurt, they're tired.... As long as we are offered work visas, then we'll be here," said Melva Guadalupe Vazquez who picked crabs in Maryland in 2019.

"A lot of people had to stay in Mexico, because they couldn't get an H-2B... We all feel lucky to have jobs here," said Jesus Escalante Martinez, a Minnesota horse trainer who worked in 2017.

Source: See *endnote 139*.

Additionally, H-2B workers must prove "nonimmigrant intent" to the State Department in order to receive visas by "demonstrat[ing] permanent employment, meaningful business or financial connections, close family ties, or social or cultural associations, which will indicate a strong inducement to return to the country of origin."<sup>142</sup> For workers who have few economic assets tying them to their home country and are seeking temporary jobs in the United States, close family ties to their home country may be their only way to demonstrate nonimmigrant intent. If the entire family is coming to the United States, many officials treat it as a sign that they will be likely to overstay.<sup>143</sup>

Some H-2B workers do occasionally overstay their visas, but that is not a significant contributor to illegal immigration relative to other sources. The government deported 972 H-2B workers from 2008 to 2019—just 0.05 percent of the immigrants deported from the United States and representing 0.1 percent of the number of visas issued.<sup>144</sup> Based on the available evidence, less than 1 percent of illegal immigrants who overstayed visas were H-2B workers.<sup>145</sup> These figures indicate the high value that legal guest workers place on the opportunity for future legal employment. Elvio Miranda from Mexico explained in 2015 that he became a guest worker because, he said, "I don't want to have trouble with migration [agents]."<sup>146</sup>

Indeed, nearly all H-2B workers attempt to return legally year after year, and between 2009 and 2013, about half were successful during that period of waning demand for H-2B labor.<sup>147</sup> In 2007, when Congress exempted returning workers from the visa cap, the program doubled in size.<sup>148</sup> Additionally, USCIS assumes that about half of these H-2B workers manage to find secondary employers to enable them to extend their status for at least a second year, and about a quarter are able to stay for the maximum of three years.<sup>149</sup> The frequency of returning workers indicates that whatever H-2B's constraints, foreign workers prefer H-2B jobs to jobs in their home countries or to illegal status.<sup>150</sup>

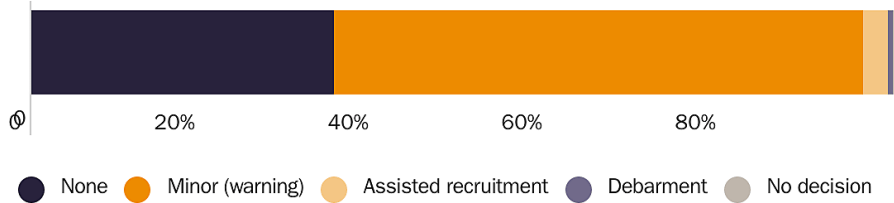
This pattern of returning undermines claims that most guest workers face severe abuse. Although abuses of workers have happened, they are not common.<sup>151</sup> Polaris, a group dedicated to combating human trafficking, received 248 complaints to its human trafficking hotline from H-2B visa holders from 2015 to 2017—about 0.1 percent of visas issued.<sup>152</sup> These are tragic cases, but as David Medina of Polaris told *The Guardian*, H-2 workers' "biggest fear is to lose that visa."<sup>153</sup>

Severe cases of abuse are rare but are often conflated with very common technical violations of the copious and complex H-2B rules. For instance, DOL's Office of Foreign Labor Certification audited a random sample of about 7 percent of H-2B employers in 2018 and found violations in about two-thirds of the cases (Figure 12), but 95 percent of those violations warranted no more action than

a warning letter. The GAO reviewed those violations and described them as minor, explaining that “several warning letters noted violations related to the period of employment of H-2B workers, such as failing to notify OFLC when H-2B workers left their jobs earlier than planned.”<sup>154</sup>

Figure 12

**Department of Labor audits of H-2B employers by outcomes and type of H-2B violation, 2018**



[Download data](#)

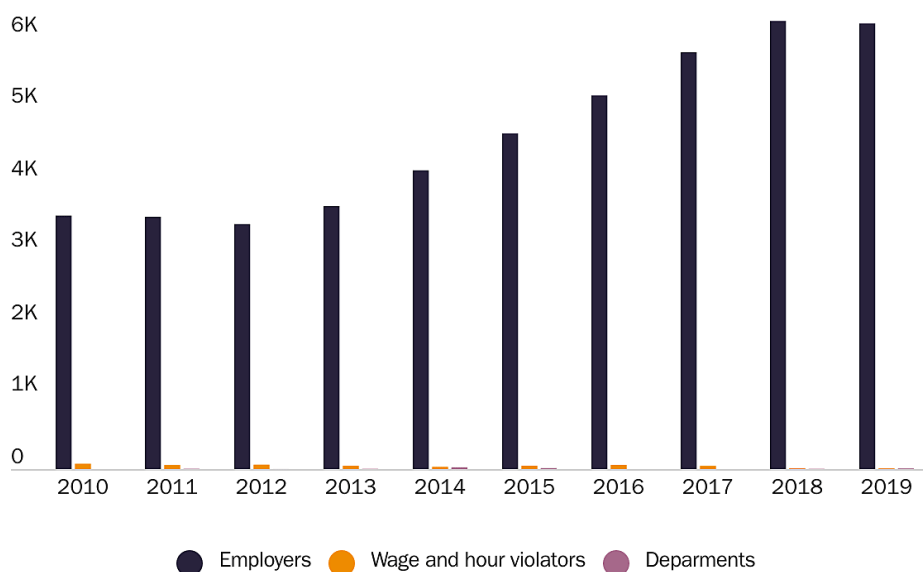
Source: Government Accountability Office, “[H-2B Visas: Additional Steps Needed to Meet Employers’ Hiring Needs and Protect U.S. Workers](#),” GAO-20-230, April 2020.

The OFLC may require employers to undergo assisted recruitment where it monitors and directs additional recruitment of U.S. workers, or it may debar them from participation in the H-2B program for any period up to five years if it determines that the employer willfully misrepresented material facts or substantially failed to comply with H-2B rules. The agency handed down this penalty just eight times from 2018 to 2020, all for failure to provide records in response to an audit request.<sup>155</sup> This could demonstrate that the employer failed to keep records, had something to hide, lost interest in the H-2B program, or that the employer is bankrupt or no longer exists.

Separate from OFLC, DOL’s Wage and Hour Division (WHD) has independent and unfettered authority to conduct investigations of employers for violations of the H-2B rules.<sup>156</sup> The WHD does publish how often its investigations find no violations, but it did turned up 11,841 violations of H-2B program rules that occurred from 2010 to 2019, but the agency rarely considered them to be very serious and imposed average fines of \$637 per violation—95 percent below the maximum of \$12,919 available to be imposed under DOL regulations.<sup>157</sup> From 2018 to 2020, WHD debarred just nine employers from the H-2B program for serious violations.<sup>158</sup> Figure 13 compares the number of participating H-2B employers to the number of cases with violations and total debarments (OFLC or WHD) per year since 2010. Debarments are barely visible because severe violations are so rare.

Figure 13

**H-2B employers, violators, and debarments, FY 2010–2019**



Sources: “Wage and Hour Compliance Action Data,” Data Enforcement, Department of Labor, updated October 15, 2020; Office of Foreign Labor Certification (OFLC), “Performance Data: Disclosure Data,” Foreign Labor Certification, Employment and Training Administration, Department of Labor; and OFLC, “Program Debarments,” Department of Labor, 2011–2020.

Notes: Employers refer to unique temporary labor certification applicants in a fiscal year because any applicant can be deemed a violator. Violators refer to Wage and Hour Division (WHD) cases with violations based on the date the violation began, and debarments refer to OFLC, Office of Inspector General, or WHD debarments that were handed down in that year.

The WHD has also required H-2B employers to pay a total of \$8.5 million in backpay to U.S. and H-2B workers from 2010 to 2019—about 10 cents for every job requested under the program.<sup>159</sup> The H-2B program requires high levels of oversight by supervisors to prevent these mundane but costly violations. The agency fails to systematically explain the reasons for every underpayment, but its press releases (relating only to what it considers its most serious violators) show that employers sometimes fail to pay workers for time spent commuting to jobs and unloading materials before they clock in, as well as not paying for meal breaks without verifying that workers actually took their full break.<sup>160</sup>

Another employer violation is allowing workers—either U.S. or H-2B—to perform job tasks not included in the job order or temporary labor certification. For instance, housekeepers become “front desk personnel” if they greet guests and help them book in.<sup>161</sup> “Desk attendants” at a bakery become bakers if they put bread into an oven.<sup>162</sup> If an employer fails to report a worker absent from the job to DOL or DHS—a common reason for an OFLC audit warning letter—the employer must still pay the worker for the time he should have worked, even if the worker left on his own.<sup>163</sup> Employers can even be deemed to violate the wage rules if they overpay workers for performing work in job categories that have a *lower* pay rate than the job listed on the job order.<sup>164</sup>

Technically, employers can obtain prevailing wage determinations for multiple occupational categories, thus allowing a worker to fill multiple roles and receive wages accordingly, but DOL makes this extremely difficult because workers must work in one category at a time.<sup>164</sup> Similarly, WHD can fine employers for letting employees work outside the area of normal commuting distance of the jobsite (a vaguely defined locale). Again, this penalty becomes more likely because DOL generally prohibits submitting a labor certification for workers in jobs in multiple areas.<sup>166</sup>

These mistakes are sometimes portrayed as malicious abuse of “captive” guest workers because H-2B workers lack the full rights of U.S. citizens. But not only do many of the violations above relate to the treatment of U.S. workers, WHD commonly finds that H-2B violations occur because the employer treated the H-2B workers *better* than U.S. workers. Because the H-2B program mandates inflated wage rates and other benefits, some employers mistakenly hire U.S. workers at the market wage but then pay their H-2B workers the higher rate. Employers may also choose to provide H-2B workers housing if they cannot find anything right away, but this also violates H-2B rules if they failed to mention it in the job order.<sup>167</sup>

The DOL and DHS have also enacted rules that better protect foreign workers against actual abuse.<sup>168</sup> Employers must disclose the names of foreign labor recruiters that they used, allowing the agencies to check them against the names of known violators. Employers now provide copies of the job order with all benefits, wages, and other program requirements in the employees' native language before the visa is issued, so workers know what they are agreeing to.<sup>169</sup>

In addition, consulates often provide workers with briefings about their rights and brochures that explain how to assert their rights and file complaints.<sup>170</sup> The prospective employer must also post a DOL poster, printed in the workers' native language, in a conspicuous location at the jobsite that contains employee rights and phone numbers where they can call to file confidential complaints.<sup>171</sup> Employers must provide detailed wage statements to workers every other week, and may not retaliate against workers for complaints, union organizing, or legal consultation.<sup>172</sup> If they do lay workers off for any reason, they must pay for their trips home.<sup>173</sup>

Workers who feel they need legal advice may use Legal Services Corporation (a private entity with federal funding) to receive "brief advice and consultation" by phone, email, or online.<sup>174</sup> LSC can also fully represent H-2B forestry workers and any H-2B trafficking victim without charge.<sup>175</sup> Abused H-2B workers may also qualify for a T visa for trafficking victims, allowing them to leave their employers and obtain permanent status in the United States if they cooperate with law enforcement.<sup>176</sup> Any H-2B worker who is the victim of a crime may also qualify for a U visa for crime victims who cooperate with law enforcement—again, with the prospect of permanent residence.<sup>177</sup> USCIS could better protect H-2B workers from trafficking or employer abuses by not canceling the status of H-2B workers when they leave their initial employers and giving them a period to search for a new H-2B job.<sup>178</sup> DOL could support this policy by expediting or eliminating the certification process for H-2B workers who are already inside the United States, so that when the worker finds a new employer it takes less time to complete the hiring process.

The most common situation that can lead to abuse is when workers pay a fee to a recruiter so that they will be referred to the H-2B employer for the job. Workers may then come to the United States and not like the job but be so in debt that they have trouble quitting. The rules explicitly prohibit employers from charging fees for the position, and they must contractually prohibit any third parties from doing so.<sup>179</sup> Consular officers now ask all H-2B visa applicants if they paid anything for the job.<sup>180</sup> If they did, employers must repay the fees, even if they had no knowledge of the arrangement. While these rules help, it is important to understand that workers will pay a recruiter for an H-2B job offer exactly because H-2B jobs are so limited.<sup>181</sup> The more H-2B hires allowed by law, the less valuable each becomes, reducing the leverage of middlemen by giving workers more options to seek legal work in the United States.

## U.S. Workers and the H-2B Program

While regulations require that employers offer all H-2B jobs to U.S. workers before they can hire H-2B workers, U.S. workers rarely respond to those offers, particularly in the top H-2B job categories in the top industries. Many U.S. workers do perform the same types of jobs as H-2B workers (see Table 1 above), but employers only enter the expensive H-2B process when they are confident that they have exhausted the local supply of workers. Table 3 shows the number of jobs requested and certified as unfilled by U.S. workers in fiscal year 2020. Overall, 93 percent of H-2B jobs requested were certified. In six of the top seven occupational categories in the top industries, 96 percent or more of H-2B jobs requested were certified.<sup>182</sup>



Table 3

**Top H-2B jobs within top H-2B industries certified as unfilled by U.S. workers, FY 2020**

| Job category                                 | Industry  | Jobs requested | Jobs certified | Share certified |
|--|---|----------------|----------------|-----------------|
| Landscaping and groundskeeping workers       | Services to buildings and dwellings                       | 71,684         | 69,940         | 98%             |
| Maids and household cleaners                 | Travel accommodations (hotels)                            | 7,458          | 7,295          | 98%             |
| Amusement and recreation attendants          | Other amusement and recreation                            | 6,881          | 6,807          | 99%             |
| Forest and conservation workers              | Support activities for forestry                           | 11,411         | 10,946         | 96%             |
| Meat, poultry, and fish cutters and trimmers | Seafood product preparation and packaging                 | 10,818         | 10,650         | 98%             |
| Construction laborers                        | Contractors: foundation, structure, and building exterior | 2,328          | 1,834          | 79%             |
| Nonfarm-animal caretakers                    | Spectator sports  | 2,082          | 2,034          | 98%             |
| All others                                   | All others  | 60,294         | 51,051         | 85%             |
| <b>Total</b>                                 | <b>All industries</b>                                     | <b>172,956</b> | <b>160,557</b> | <b>93%</b>      |

Sources: Office of Foreign Labor Certification, "Performance Data: Disclosure Data," Foreign Labor Certification, Employment and Training Administration, Department of Labor.

Notes: Jobs requested excludes withdrawn applications and rejected without review applications (duplicates). Industry North American Industry Classification System codes are 5617, 7211, 7139, 1153, 3117, 2381, and 7112. Job Standard Occupational Classification System codes are 37-3011, 37-2012, 39-3091, 45-4011, 51-3022, 47-2061, and 39-2021.

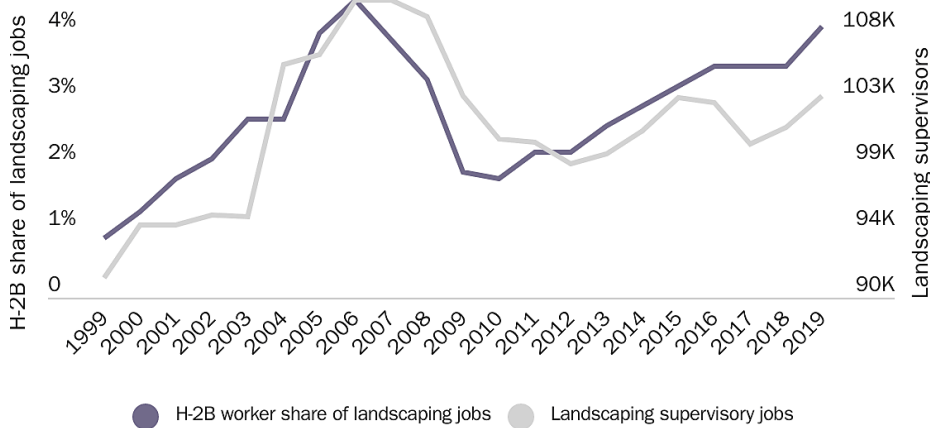
Employers have turned to the H-2B program in greater numbers since the 1990s because more U.S. workers are looking for permanent, year-round positions with better pay and working conditions. When U.S. workers are unemployed, they may also have access to government benefits such as unemployment insurance, which helps support them until they find a job that they want. The two most important long-term trends that may have led U.S. workers away from H-2B jobs are the increasing share of U.S. workers with high school and college degrees and, relatedly, the decreasing share of young people seeking summer employment — specifically men — who had previously often worked summer jobs like landscaping. The labor force participation rate for U.S. teens declined from 59 percent in the summer of 1989 to 35 percent in the summer of 2019.<sup>183</sup> At the same time, the share of Americans who have attended at least some college increased from 38 percent to 62 percent, enabling them to find other jobs.<sup>184</sup>

Fortunately, when employers do meet their temporary needs with H-2B workers, demand increases for U.S. workers in other, often year-round, positions because H-2B workers increase firms' productivity. The GAO found that businesses that received all their requested H-2B workers reported more revenue than those that did not.<sup>185</sup> This enables those companies to support U.S. workers in other roles. By contrast, Mike Leman explained that the H-2B visa cap cost his company, Singing Hills Landscape in Colorado, a 25 percent sales drop.<sup>186</sup> Lehman noted that "We were unable to support the planned hiring of an account manager, a project manager, a CFO [Chief Financial Officer] ... and a landscape designer — nearly \$300,000 in additional payroll." Over the last two decades, landscaping companies have hired about one landscaping supervisor for every eight or nine workers. The H-2B program brought in about 25,000 landscaping workers in 2019, creating demand for about 3,000 supervisors — hardly any of whom come in as H-2B workers.<sup>187</sup>

In fact, the number of landscaping supervisory positions increased by 13 percent, or 12,250, from May 1999 to May 2019, as the H-2B program expanded, but it was even higher in 2007 when the number of H-2B workers peaked. Figure 14 shows how the expansion of the H-2B share of landscaping jobs — as a result of more jobs being requested — is generally correlated with growth in employment for supervisors of landscaping workers. "When we can't get those [H-2B] workers, we actually have to decline jobs," John McMahon, the CEO of the Associated Landscape Contractors of Colorado, said in 2020 after employers immediately filled the cap. "In this economic environment, we actually have to turn down millions of dollars of projects that are out there."<sup>188</sup>

Figure 14

**H-2B share of landscaping workers and total supervisors and managers of landscaping workers, 1999–2019**



Sources: Office of Foreign Labor Certification, “[Performance Data: Disclosure Data](#),” Foreign Labor Certification, Employment and Training Administration, Department of Labor; “[Occupational Employment Statistics: OES Data](#),” Bureau of Labor Statistics, May 2019; “[Nonimmigrant Visa Statistics](#),” Department of States; and Government Accountability Office, “[H-2B Visas: Additional Steps Needed to Meet Employers’ Hiring Needs and Protect U.S. Workers](#),” GAO-20-230, April 2020.

Notes: H-2B workers in landscaping were calculated by taking the share of H-2B Department of Labor-certified jobs times the number of visas permitted in that year except from the years when the cap was reached. Because the landscaping industry has received fewer workers through the lottery than its share of jobs, the share of landscaping industry petitions approved for the year available (2018) was used for those years.

The increased production that H-2B workers permit also raises demand for U.S. workers elsewhere because more productive companies purchase more materials and supplies. According to the GAO, “employers that did not receive all requested H-2B visas under the standard cap more frequently reported declines in purchases of goods and services than employers who received visas in 2018.”<sup>189</sup> Mike Baker, the owner of Baker Landscape and Irrigation in New York, explained that when he failed to receive H-2B workers because of the cap in 2019, he reduced services and turned away at least \$150,000 in contracts, which meant that he spent \$125,000 less on materials than the prior year, and he abandoned his plan to buy a truck. “The Ford dealer got less money,” Baker said.<sup>190</sup> H-2B workers also spend a significant portion of their wages in the United States for housing and food, creating further demand for jobs in those sectors.

When jobs get filled quickly, the cycle of filling jobs and creating demand for other jobs speeds up. Unemployed U.S. workers might take years to move to seasonal jobs in — to take a common H-2B example — a resort town. But when H-2B workers fill them immediately, that creates demand for an array of other jobs elsewhere and the overall job market starts to improve. Research has found that by being faster to move to open jobs, foreign workers — including H-2B workers — “grease the wheels of the labor market,” raising the wages of U.S. workers by billions of dollars annually by increasing demand for jobs where U.S. workers live.<sup>191</sup> In the same vein, the National Academy of Sciences has noted that “immigration can lower native unemployment” because the “entry of new workers through migration increases the likelihood of filling a vacant position quickly and thus reduces the net cost of posting new offers.”<sup>192</sup>

By taking temporary, and often remote, jobs, H-2B workers also allow U.S. workers to specialize in permanent jobs that are closer to home. Economic research has shown that low-skilled immigration has caused Americans without a high school degree or only a high school degree to shift to “interactive and language-intensive tasks” that are less physically demanding and that foreign workers with limited English-language skills cannot as easily perform.<sup>193</sup> Similar research has demonstrated that this shift has led Americans to work in safer jobs, resulting in fewer workplace injuries.<sup>194</sup> Forestry, for example, is one of the most dangerous jobs in the United States, so by filling nearly all H-2B forestry jobs and creating demand for other jobs for Americans, H-2B workers make the workplace safer for Americans.<sup>195</sup>

## Streamlining the H-2B Program

The H-2B program exists to prevent temporary jobs from going unfilled when U.S. workers don't take them. The current rules mainly focus on making these jobs attractive to American workers — such as by mandating higher wages and benefits — but do relatively little to ensure that employers can efficiently fill the positions that U.S. workers reject. The H-2B visa cap and its rules limit the program's potential as a powerful economic engine and an alternative to illegal employment. Many employers cannot use the program for three reasons: the cap is too low, the costs are too high, and the process is too long and complex. This section details reforms intended to rectify these shortcomings.

## Fixing the H-2B cap

The most pressing problem facing the H-2B program is that demand for workers far exceeds the annual visa cap of 66,000 — a number that Congress invented three decades ago with almost zero public debate in the Immigration Act of 1990.<sup>196</sup> The H-2B cap is unjustifiable. There are two ways to execute a protectionist visa policy: one is a cap, and the other is mandated recruitment of U.S. workers. The H-2A program for agricultural workers is uncapped because farmers must first recruit U.S. workers. The H-1B program for skilled workers has a cap because there is no recruitment mandate. But the H-2B program inexplicably has both. Employers must recruit U.S. workers, and even if U.S. workers reject the jobs, the law can still require the positions to go unfilled, thus harming employers and U.S. workers in complementary employment.

Congress should uncap the H-2B program, but in lieu of congressional action, the administration can adopt three rule changes to mitigate the cap's perverse effects. First, DOL should allow employers with recurring temporary positions to recruit workers who will commit to return year-after-year, certifying the temporary recurring job for at least three years at a time.<sup>197</sup> As is the case now, the State Department should grant a visa valid for the certification length,<sup>198</sup> and CBP should then grant a right to H-2B status valid for the duration of the petition (three years).<sup>199</sup> Because the cap only applies to *new* visa issuances or grants of status pursuant to a new petition, three-year grants would greatly ease the effect of the cap.<sup>200</sup> During the time between seasons, H-2B workers could return home or find other H-2B jobs.

Employers already treat these returning workers as existing employees coming back to their positions after a couple months away.<sup>201</sup> Indeed, when employers start the H-2B prevailing wage determination process, the future returning workers are almost always still working that job. If the agencies adopted the employers' view, the job orders could perhaps attract more Americans by notifying them of the jobs' recurring nature, while also streamlining the process for H-2B employers and workers if Americans rejected the multiyear offer.

Second, USCIS should remove the requirement that currently employed H-2B workers leave the country for 90 days after three years.<sup>202</sup> This requirement forces economically pointless turnover on employers and imposes unnecessary administrative burdens on the government. It can create the potential for more visa overstays and requires vetting a whole new crop of untested foreign workers — a waste of resources for everyone involved. Other categories of temporary workers are not subject to this requirement — such as international students and O-1 visa holders for workers with “extraordinary ability” — and USCIS has already permitted extensions beyond the three-year limit during the COVID-19 pandemic for employees who are considered to be essential to the U.S. food supply.<sup>203</sup> Extending this policy to all industries would provide much-needed visa cap relief.

Third, USCIS should authorize spouses and older minor children of H-2B workers entering on H-4 visas to work, filling any H-2B job that the cap would otherwise cause to go unfilled. USCIS has already used its authority to grant employment authorization documents for certain H-4 spouses of H-1B workers, and it can use this power to permit employment by family members of H-2B workers and make sure that the H-2B program is fulfilling its economic purpose.<sup>204</sup>

## Improving H-2B wages

The H-2B rules also inflate the prevailing wage higher than the wages for a majority of similar U.S. workers, which is unfair to employers who are seeking to hire foreign workers legally. The artificially high wage requirement actually encourages employers to hire illegal workers with fraudulent or borrowed documents rather than follow the process that Congress established to solve labor shortfalls.

The easiest way to correct this problem would be to permit the use of a job category's median wage (the exact midpoint of all wages) rather than the average wage (which is almost always skewed higher as a result of outliers at the top end of the wage distribution) as the prevailing wage. In 2015, DOL justified using the average wage because it "provides equal weight to the wage rate received by each worker in the occupation across the wage spectrum."<sup>205</sup> Yet this is precisely why it should not be used. A single atypical wage can skew the average, particularly in areas with few observations. For this reason, the Bureau of Labor Statistics reports the median wage as the "usual weekly earnings of wage and salary workers," not the average.<sup>206</sup>

A more significant reform would be for DOL to stop requiring the average wage *for an entire job category* and return to using skill levels to determine wages. The agency's preferred wage source (the Occupational Employment Statistics survey) does not record skills directly (such as by asking about workers' experience, training, education, etc.), but DOL had previously overcome this shortcoming by mathematically creating four OES wage levels. The DOL reasonably assumed that lower wages would reflect lower skills within the same jobs in the same area, so in 1998, it had the Bureau of Labor Statistics take the one-third of workers with the lowest wages in the job category and average those wages to manufacture an "entry level" wage at the lower end of the wage distribution. It then took the top two-thirds of wage earners and averaged their wages to create a "fully competent," or supervisory, wage level at the top of the distribution. In 2005, it created two intermediary levels that are equally distributed between the top and bottom wages.<sup>207</sup>

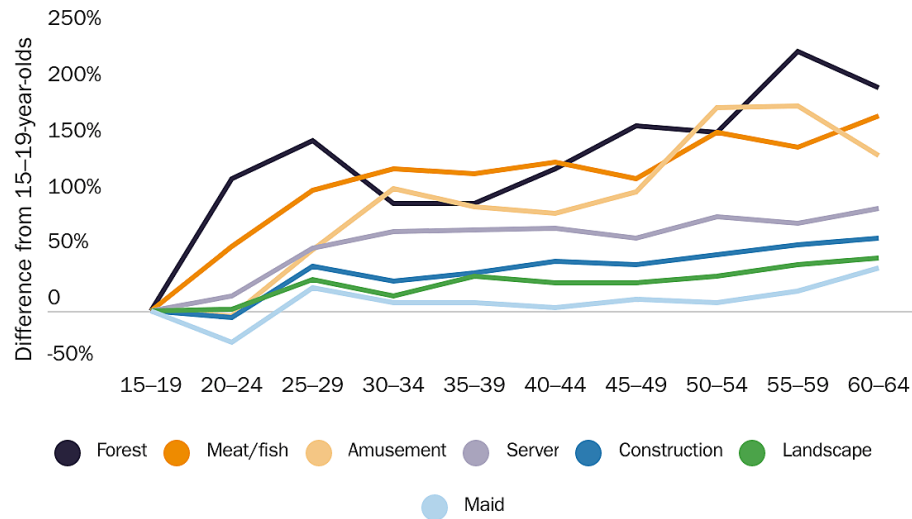
But in 2013 and then in 2015, DOL rejected this approach in two rules by denying the existence of "significant skill-based wage differences in the occupations that predominate in the H-2B program."<sup>208</sup> Inconsistently, the agency continued to create OES wage levels for permanent jobs in the exact same job categories as those included in the H-2B program under the immigrant visa program.<sup>209</sup>

In any case, DOL is wrong that no skill-based wage differences exist in H-2B jobs. Figure 15 uses data from the Census Bureau's American Community Survey — which, unlike the OES, collects responses from individuals in households rather than businesses — to show that wages generally rise with age in all the top H-2B jobs. While maids saw minimal wage growth, other workers aged 35 to 39 averaged higher wages than teenage workers in their job categories: from 32 percent for landscapers to 123 percent for meat and seafood processors. In absolute terms, that is between \$3.22 and \$9.48 in higher wages per hour. Given that these are the exact same jobs but with employees of different ages, these increases mostly reflect the increasing skills of workers over time.<sup>210</sup> Greater experience leads to better skills, which in turn leads to greater productivity — and that makes the worker more valuable to the company. The DOL should return to its earlier skills-based wage structure for jobs.



Figure 15

**Hourly wage difference from teenage employment in top H-2B job categories by age, 2018**



Sources: American Community Survey, 1-Year Estimates—Public Use Microdata Sample, 2018; and George Borjas and Hugh Cassidy, “The Wage Penalty to Undocumented Immigration,” *Labour Economics* 61 (December 2019). Notes: Weeks worked were estimated as the following: interval 0–13 weeks as 8; 14–26 weeks as 20.8; 27–39 weeks as 33.1; 40–47 weeks as 42.2; 48–49 weeks as 48.3; 50–52 weeks as 51.9. Hourly wages computed by dividing average annual wage and salary income by usual weekly hours worked times weeks worked last year.

H-2B wages should only apply to American workers who are hired directly as a result of the posted job offer as part of the TLC process. The wages, benefits, and regulations should not apply to existing workers or other hires. The corresponding employment rule that extends the regulations to all similar U.S. workers makes it too expensive and risky to go through the H-2B process for a marginal position that could be left unfilled — even if it means worse service or lower productivity — because the H-2B costs are spread to all similar employees. Congress has repeatedly defunded enforcement of this rule each year since its introduction in 2015, but DOL has maintained it and threatens to enforce the rule against employers who violated it during the period when enforcement was defunded.<sup>211</sup> Congress or DOL should simply rescind the rule to provide certainty for U.S. employers.

Finally, the prevailing wage determination should not apply to H-2B workers at all because its only stated purpose is to prop up the wages of Americans. Foreign workers would only take H-2B jobs if the wage offered is higher than their wages at home, and a higher wage would result in fewer hires, thus harming foreign workers overall. If employers recruit at the prevailing wage and cannot find U.S. workers to fill the positions, they should be able to hire as many H-2B workers as they want at the market wage. After all, if American workers refused the job at the higher wage, they would reject it at a lower wage as well. This change would allow the employers to potentially hire twice as many H-2B workers, thus increasing the productivity of their companies and raising the demand for U.S. workers in complementary jobs.

## Streamlining the process

As Figure 2 shows, the H-2B application process winds its way through a bureaucratic labyrinth with substantive reviews by two DOL subagencies, the State Workforce Agency, USCIS, and the State Department, over at least five months with two potential backend review processes. First, DOL should harmonize the H-2B prevailing wage determination process with the H-1B process for high skilled workers, under which H-1B employers can either obtain a prevailing wage determination or simply choose to look up the relevant wage for the job and risk the penalties if they use the wrong rate.<sup>212</sup> If DOL refuses to trust H-2B employers to the same extent that it trusts H-1B employers, then it should allow employers that have received prior PWDs based on the same job description to look up the relevant rate.

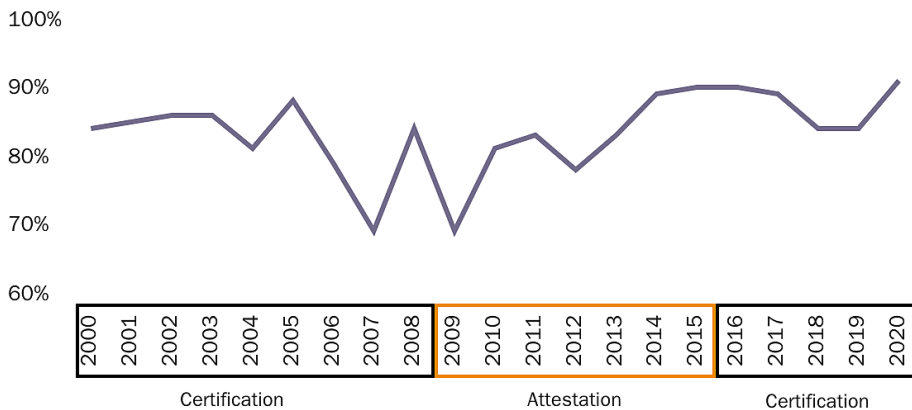
Second, DOL should create a single filing platform or portal for submitting a temporary labor certification, State Workforce Agency job order, and USCIS petition with the relevant portions reviewed only once by each agency. The USCIS should not duplicate the labor department’s efforts

by making a separate determination of whether a job is temporary by using different evidence. In this proposed model, USCIS would have no substantive information to review in the petition portion of the single filing platform if the employer did not request specific workers.<sup>213</sup> Instead, it would automatically approve the petition. The USCIS could adopt this automatic approval concept even without a single filing platform. If employers tell DOL that they are not seeking named workers, DOL could forward the temporary labor certification to USCIS, which could immediately approve the petition without additional employer actions.<sup>214</sup>

Third, DOL should restore the streamlined TLC process that it used between 2009 and 2015, which allowed employers to conduct the recruitment prior to filing a TLC, effectively moving the application (Figure 2, Step 3) to when the initial recruitment report is filed (Step 5).<sup>215</sup> In addition, when employers filed the TLC, they did not need to submit — and DOL did not need to review — all the underlying evidence of recruitment and temporary need, thus eliminating the recruitment report filing (Step 5) and allowing for a much shorter filing timeframe. Instead, employers attested that they had a temporary need and recruited U.S. workers. Rather than conducting a detailed certification review, DOL had the authority (for the first time) to conduct post-certification audits and issue fines to verify H-2B attestations. The DOL justified this shift to using resources at the backend of the process on the grounds that audits provide a better assessment of program compliance than the temporary labor certification.<sup>216</sup>

In 2015, DOL reversed the streamlining changes and required an even longer period of recruitment after filing a TLC (an increase from 10 days to between 40 and 70 days), stating that these changes would reduce program violations and encourage more U.S. workers to respond to job orders. Both predictions turned out to be incorrect. In 2018, DOL's random audits uncovered a higher percentage of employers with violations than in 2010 and 2011, when DOL used the attestation process.<sup>217</sup> Moreover, as Figure 16 shows, the shifts from certification to attestation and back made no change in the percentage of jobs that DOL certifies as unfilled by U.S. workers, implying that it found that U.S. workers were not more likely to apply for H-2B jobs. Meanwhile, the time between filing and final adjudication jumped from 18 days in 2014 to 47 days in 2019.

Figure 16  
**Share of H-2B jobs certified as not filled by U.S. workers by the Department of Labor, FY 2000–2020**



Sources: Office of Foreign Labor Certification (OFLC), “Performance Data: Disclosure Data,” Foreign Labor Certification, Employment and Training Administration, Department of Labor; OFLC, “Performance Data: Annual Reports,” 2020; and OFLC, “H-2B Program Data,” 2007.  
Note: This excludes applications where certification was not decided (withdrawn or summarily rejected applications). The number of jobs requested by 2013–2014 withdrawn applications are estimated based on 2015.

## Conclusion

The H-2B program has more than 175 bureaucratically complex rules that prevent employers from accessing legal workers. H-2B mandated wages have increased at twice the rate of all wages since 2011, but still, few Americans are willing to take these temporary, often tough jobs. The H-2B program expanded rapidly in the early 2000s as fewer illegal workers crossed the border, which caused illegal immigration from Mexico to decline even further. Unfortunately, the low H-2B cap still prevents even employers willing to engage in this lengthy legal process from filling open positions.

The H-2B program benefits American employers who cannot find willing U.S. workers at the prevailing wage and increases demand for other jobs that U.S. workers are more willing to fill. To increase these benefits, policymakers should streamline the H-2B application process, base wages on skill level, and raise or eliminate the H-2B cap to accommodate U.S. employers' proven needs. It should issue visas and status that last a minimum of three years to avoid workers having to reapply every year, and it should allow renewals beyond three years if the workers maintain employment. It can also craft rules to allow foreign workers to easily leave and change employers throughout their three-year period to further prevent abuses.

# Appendix



Table A

**H-2B program requirements**

|   | Requirement   | Regulation               | Statute                   |
|---|---|--------------------------|---------------------------|
| <b>Department of Labor Employer Rules</b> |   |                          |                           |
| 1   | Hire workers only for temporary needs   | 20 CFR § 655.6           | 8 USC § 1101(a)(H)(ii)(b) |
| 2   | Hire workers only for non-farm, non-agricultural needs  | 20 CFR § 655.1           | 8 USC § 1101(a)(H)(ii)    |
| 3   | Offer jobs not more than a year unless based on a 1 time need   | 8 CFR 214.2(h)(6)(ii)(B) | PL 114-113                |
| 4   | Offer jobs of no more than 3 years if based on a 1 time need  | 20 CFR § 655.6           | No statute                |
| 5   | File a new temporary labor certification for each year of need  | 8 CFR 214.2(h)(6)(iv)(B) | No statute                |
| 6   | May not use a job contractor to hire H-2B workers unless the employer signs the labor certification application   | 20 CFR § 655.19(d)(1)    | No statute                |
| 7   | If using a job contractor, validate the wages meet H-2B standards   | 20 CFR § 655.19(c)       | No statute                |
| 8   | If using a job contractor, validate the working conditions meet H-2B standards  | 20 CFR § 655.19(d)(2)    | No statute                |
| 9   | Clearly differentiate job contractors for final employers on job orders and advertisements  | 20 CFR § 655.19(e)(2)    | No statute                |
| 10  | Disclose foreign labor recruiter contracts  | 20 CFR § 655.9(a)        | No statute                |
| 11  | Provide statement stating there were no foreign labor recruiters used if none were  | 20 CFR § 655.9(a)        | No statute                |
| 12  | Contractually prohibit any foreign labor recruiters from charging fees  | 20 CFR § 655.20(p)       | No statute                |
| 13  | Request a prevailing wage determination on ETA Form 9141  | 20 CFR § 655.10(c)       | No statute                |
| 14  | If requesting use of a survey to determine the prevailing wage other than the Occupational Employment Statistics (OES) survey, submit ETA Form 9165                                       | 20 CFR § 655.10(f)(4)    | No statute                |
| 15  | Receive a prevailing wage determination before filing a labor certification application   | 20 CFR § 655.15          | No statute                |
| 16  | Ask for review of a prevailing wage determination by the director within 7 business days  | 20 CFR § 655.13(a)       | No statute                |
| 17  | Appeal a prevailing wage determination to BALCA within 10 business days of review of the director   | 20 CFR § 655.13(c)       | No statute                |
| 18  | Offer the higher of the prevailing wage or actual wage the employer paid to similar employees   | 20 CFR § 655.10(a)       | PL 114-113                |
| 19  | Pay the highest prevailing wage determination of any area in which workers will work  | 20 CFR § 655.10(d)       | No statute                |
| 20  | Prevailing wage must generally be based on either a Collective Bargaining Agreement or the average wage for an entire occupation ignoring skills in the area of intended employment       | 20 CFR § 655.10(b)       | No statute                |
| 21  | An employer may not use a prevailing wage determination for more than 1 year  | 20 CFR § 655.10(h)       | No statute                |
| 22  | File ETA Form 9142B and appropriate appendices to apply for a labor certification   | 20 CFR § 655.15(a)       | No statute                |
| 23  | Must apply for labor certification after receiving prevailing wage determination  | 20 CFR § 655.15          | No statute                |
| 24  | Apply for a labor certification   | 20 CFR § 655.15(b)       | No statute                |
| 25  | Apply for a labor certification not earlier than 90 days before date of need  | 20 CFR § 655.15(b)       | No statute                |
| 26  | Apply for a labor certification not later than 75 days before date of need unless an act of God or other unpredictable cause prevents an employer from knowing that they may need to file | 20 CFR § 655.15(b)       | No statute                |
| 27  | Employer associations may not file on behalf of individual members  | 20 CFR § 655.15(f)       | No statute                |
| 28  | Submit only one labor certification application for worksites within one area of intended employment  | 20 CFR § 655.15(f)       | No statute                |
| 29  | Submit only one labor certification application for worksites for each job opportunity  | 20 CFR § 655.15(f)       | No statute                |
| 30  | Submit only one labor certification application for worksites within one area of intended employment for each job period  | 20 CFR § 655.15(f)       | No statute                |
| 31  | May not submit a master application by employer association on behalf of members  | 20 CFR § 655.15(f)       | No statute                |
| 32  | Submit a job order requesting U.S. workers to any State Workforce Agency within intended job area   | 20 CFR § 655.16(a)       | No statute                |
| 33  | Submit a job order at the same time as the labor certification application  | 20 CFR § 655.16(a)       | No statute                |
| 34  | Offer same wages & conditions to U.S. workers as to H-2B workers  | 20 CFR § 655.20(e)       | No statute                |
| 35  | Impose job requirements consistent with those non-H-2B employers in the same area and job   | 20 CFR § 655.20(f)       | No statute                |
| 36  | Offer only full-time employment   | 20 CFR § 655.18(b)(2)    | No statute                |
| 37  | Offer at least 35 hours per week (as the definition of full time)   | 20 CFR § 655.5           | No statute                |
| 38  | Use a single workweek to calculate wages due  | 20 CFR § 655.18(b)(8)    | No statute                |

Table A (continued)

**H-2B program requirements**

|   | Requirement  | Regulation                       | Statute    |
|---|--|----------------------------------|------------|
| <b>Department of Labor Employer Rules (continued)</b> |  |                                  |            |
| 39  | Pay wages equal to the offered wage every week regardless of the average across weeks  | 20<br>CFR § 655.20(a)<br>(2)     | No statute |
| 40  | Pay workers at least every two weeks   | 20<br>CFR § 655.20(h)            | No statute |
| 41  | Pay workers more frequently than every two weeks if it is the prevailing practice in the area to do so   | 20<br>CFR § 655.20(h)            | No statute |
| 42  | Disclose in advance the cost of any wage deductions or housing costs   | 20<br>CFR § 655.18(b)<br>(10)    | No statute |
| 43  | Treat U.S. workers in "corresponding employment" whether recruited under H-2B job order or not the same as H-2B workers  | 20<br>CFR § 655.20               | No statute |
| 44  | Pay whatever wage is offered in the job order  | 20<br>CFR § 655.20(a)<br>(1)     | No statute |
| 45  | Make up any shortfall between offered wage and incentive-based pay   | 20<br>CFR § 655.20(a)<br>(2)     | No statute |
| 46  | File ETA Form 9142B and appropriate appendices to apply for a labor certification  | 20<br>CFR § 655.20(a)<br>(3)     | No statute |
| 47  | Pay wages in cash free and clear   | 20<br>CFR § 655.20(b)            | No statute |
| 48  | Make no deductions that aren't required by law or court, for housing, for the workers' benefit at their request, or authorized by collective bargaining                | 20<br>CFR § 655.20(c)            | No statute |
| 49  | Provide housing to workers who are mobile and will need multiple residences during their stay  | 80<br>FR 24063                   | No statute |
| 50  | Don't charge for housing to workers who are mobile and will need multiple residences during their stay if it will reduce their wages below the prevailing wage         | 80<br>FR 24063                   | No statute |
| 51  | Pay at least 3/4 of the hours offered in the job order except in case of acts of God for each 6 week period or 12 week period for jobs more than 120 days              | 20<br>CFR § 655.20(f)            | No statute |
| 52  | Do not require workers to work more than the daily hours offered in the job order  | 20<br>CFR § 655.20(f)<br>(7)     | No statute |
| 53  | Provide earnings statements on each payday showing all deductions  | 20<br>CFR § 655.20(i)            | No statute |
| 54  | Reimburse cost of transportation from abroad or elsewhere for all H-2B and U.S. workers to jobsite, if they complete 50% of the job period                             | 20<br>CFR § 655.20(j)<br>(1)(i)  | No statute |
| 55  | Reimburse cost of food of at least \$10.64 per day during travel from abroad or elsewhere for all H-2B and U.S. workers to jobsite, if they complete 50% of the job    | 20<br>CFR § 655.20(j)<br>(1)(i)  | No statute |
| 56  | Advance transportation costs during travel from abroad if it is the prevailing practice in the area  | 20<br>CFR § 655.20(j)<br>(1)(i)  | No statute |
| 57  | Advance food costs during travel from abroad if it is the prevailing practice in the area  | 20<br>CFR § 655.20(j)<br>(1)(i)  | No statute |
| 58  | Pay cost of transportation back to home country or state from jobsite if they complete the contract or are dismissed early   | 20<br>CFR § 655.20(j)<br>(1)(ii) | No statute |
| 59  | Pay cost of food of at least \$10.64 per day during travel back abroad or elsewhere for all H-2B and U.S. workers if they complete the contract or are dismissed early | 20<br>CFR § 655.20(j)<br>(1)(ii) | No statute |
| 60  | Reimburse entry fees and visa fees   | 20<br>CFR § 655.20(j)<br>(2)     | No statute |
| 61  | Reimburse visa fees within 1 week  | 20<br>CFR § 655.20(j)<br>(2)     | No statute |
| 62  | Reimburse entry fees within 1 week   | 20<br>CFR § 655.20(j)<br>(2)     | No statute |
| 63  | Provide without charge all tools required for the job  | 20<br>CFR § 655.20(k)            | No statute |
| 64  | Provide job order to worker  | 20<br>CFR § 655.20(l)            | No statute |
| 65  | Provide job order to worker no later than the visa application   | 20<br>CFR § 655.20(l)            | No statute |
| 66  | Provide job order to worker in the worker's language   | 20<br>CFR § 655.20(l)            | No statute |
| 67  | Post and maintain a DOL poster in a conspicuous location at the jobsite that sets out the rights and protections for workers   | 20<br>CFR § 655.20(m)            | No statute |
| 68  | Don't retaliate against employees who file complaints with the government  | 20<br>CFR § 655.20(n)            | No statute |
| 69  | Do not receive any payment or benefit from workers to provide them jobs including kickbacks  | 20<br>CFR § 655.20(o)            | No statute |
| 70  | Do not permit any employee to receive any payment or benefit from workers to provide them jobs including kickbacks   | 20<br>CFR § 655.20(o)            | No statute |
| 71  | Do not charge employees for attorney, application, or petition fees  | 20<br>CFR § 655.20(o)            | No statute |
| 72  | Hire all qualified U.S. workers who apply through 21 days prior to the job start   | 20<br>CFR § 655.20(r)            | No statute |

Table A (continued)

**H-2B program requirements**

|   | Requirement   | Regulation                   | Statute    |
|---|---|------------------------------|------------|
| <b>Department of Labor Employer Rules (continued)</b> |   |                              |            |
| 73  | Conduct all recruitment required by the certifying officer  | 20<br>CFR § 655.20(s)        | No statute |
| 74  | Cooperate with the State Workforce Agency in accepting all referrals of U.S. workers until 21 days before job start   | 20<br>CFR § 655.20(t)        | No statute |
| 75  | Don't hire during a labor dispute (lockout or strike)   | 20<br>CFR § 655.20(u)        | No statute |
| 76  | Don't hire during a labor dispute (lockout or strike) at any employer location  | 20<br>CFR § 655.20(u)        | No statute |
| 77  | Don't fire any similarly employed U.S. workers during the 120 day period before the date of need  | 20<br>CFR § 655.20(v)        | No statute |
| 78  | Don't fire any similarly employed U.S. workers throughout the period of employment  | 20<br>CFR § 655.20(v)        | No statute |
| 79  | Contact all former U.S. employees to offer the H-2B job to them   | 20<br>CFR § 655.20(w)        | No statute |
| 80  | Start contacting all former U.S. employees to offer the H-2B job to them within 14 days of date of acceptance of the labor certification application  | 20<br>CFR § 655.40(b)        | No statute |
| 81  | Contact all former U.S. employees employed in the last year to offer the H-2B job to them   | 20<br>CFR § 655.20(w)        | No statute |
| 82  | Employ workers only in areas listed on labor certification application  | 20<br>CFR § 655.20(x)        | No statute |
| 83  | Employ workers only in job duties listed on labor certification application   | 20<br>CFR § 655.20(x)        | No statute |
| 84  | Notify OFLC of any H-2B worker who fails to appear for the job for 5 consecutive days (absconds)  | 20<br>CFR § 655.20(y)        | No statute |
| 85  | Notify OFLC of any similar U.S. worker who fails to appear for the job for 5 consecutive days (absconds)  | 20<br>CFR § 655.20(y)        | No statute |
| 86  | Notify OFLC of any H-2B worker who fails to appear for the job for 5 consecutive days (absconds) within 2 business days   | 20<br>CFR § 655.20(y)        | No statute |
| 87  | Notify OFLC of any similar U.S. worker who fails to appear for the job for 5 consecutive days (absconds) within 2 business days   | 20<br>CFR § 655.20(y)        | No statute |
| 88  | Pay 3/4ths guarantee to any U.S. worker who fails to appear for the job if notice is not provided to OFLC within 2 business days  | 20<br>CFR § 655.20(y)        | No statute |
| 89  | Pay 3/4ths guarantee to any H-2B worker who fails to appear for the job if notice is not provided to OFLC within 2 business days  | 20<br>CFR § 655.20(y)        | No statute |
| 90  | Do not confiscate or destroy any passports or immigration documents   | 20<br>CFR § 655.20(z)        | No statute |
| 91  | Document all reasons for rejecting U.S. applicants for jobs   | 20<br>CFR § 655.40(a)        | No statute |
| 92  | Conduct all interviews by phone or in the location where the worker is so they incur little or no costs   | 20<br>CFR § 655.40(d)        | No statute |
| 93  | All recruitment for the job must contain the same information as the job order  | 20<br>CFR § 655.41(a)        | No statute |
| 94  | Provide the job opportunity to a collective bargaining representative   | 20<br>CFR § 655.45(a)        | No statute |
| 95  | Provide the job opportunity to a collective bargaining representative within 14 days of date of acceptance of labor certification application   | 20<br>CFR § 655.40(b)        | No statute |
| 96  | If there is no collective bargaining representative, post the job opportunity in 2 conspicuous locations  | 20<br>CFR § 655.45(b)        | No statute |
| 97  | If there is no collective bargaining representative, post the job opportunity in 2 conspicuous locations for 15 consecutive business days   | 20<br>CFR § 655.45(b)        | No statute |
| 98  | If there is no collective bargaining representative, place the job opportunity in 2 conspicuous locations for 15 consecutive business days starting within 14 days of the date of acceptance of the labor certification application | 20<br>CFR § 655.40(b)        | No statute |
| 99  | If ordered by the certifying officer, provide the job order to a community-based organization   | 20<br>CFR § 655.45(c)        | No statute |
| 100   | If ordered by the certifying officer, provide the job order to a community-based organization within 14 days of date of acceptance  | 20<br>CFR § 655.45(c)        | No statute |
| 101   | Conduct additional recruitment specified by the certifying officer  | 20<br>CFR § 655.46(a)        | No statute |
| 102   | Start to conduct all additional specified recruitment within 14 days of the notice of acceptance of labor certification application   | 20<br>CFR § 655.40(b)        | No statute |
| 103   | Submit an initial recruitment report to DOL that contains information on the recruitment activity and any applicants and any reasons for rejecting them   | 20<br>CFR § 655.48(a)        | No statute |
| 104   | Update and sign final recruitment report through the 21st day prior to the date of need   | 20<br>CFR § 655.48(b)        | No statute |
| 105   | Provide documentary proof of contact for all former employees   | 20<br>CFR § 655.48(a)<br>(3) | No statute |
| 106   | Provide proof of contact of collective bargaining representative  | 20<br>CFR § 655.48(a)<br>(4) | No statute |
| 107   | Retain all documents to prove compliance with all H-2B requirements for 3 years   | 20<br>CFR § 655.56(b)        | No statute |
| 108   | Make available all documents to Wage and Hour Division  | 20<br>CFR § 655.56(d)        | No statute |
| 109   | Make available all documents to Wage and Hour Division within 72 hours  | 20<br>CFR § 655.56(d)        | No statute |
| 110   | If U.S. workers become unavailable after 21 days before the date of need, must submit a request for redetermination by the certifying officer   | 20<br>CFR § 655.57(a)        | No statute |
| 111   | Appeal a labor certification denial to BALCA within 10 business days  | 20<br>CFR § 655.53(c)        | No statute |

Table A (continued)

**H-2B program requirements**

|   | Requirement   | Regulation                   | Statute             |
|---|---|------------------------------|---------------------|
| <b>Department of Labor Employer Rules (continued)</b> |   |                              |                     |
| 112   | Respond to a Notice of Deficiency with corrections within 10 business days  | 20 CFR § 655.31(b)(2)        | No statute          |
| 113   | Appeal a Notice of Deficiency within 10 business days   | 20 CFR § 655.31(b)(3)        | No statute          |
| 114   | Request an extension of job period only in cases of factors beyond employer's control such as weather   | 20 CFR § 655.60              | No statute          |
| 115   | Maintain records for 3 years showing evidence that the employer was likely to suffer irreparable harm if it doesn't receive H-2B workers if petitioning under temporary supplemental cap increase                                       | 20 CFR § 655.67              | No statute          |
| 116   | Submit documents requested by an audit letter from the certifying officer   | 20 CFR § 655.70(b)(2)        | No statute          |
| 117   | Submit documents requested by an audit letter from the certifying officer within at least 30 days   | 20 CFR § 655.70(b)(2)        | No statute          |
| 118   | Cooperate with WHD investigators  | 20 CFR § 655.20(bb)          | 8 USC § 1184(c)(14) |
| 119   | Pay back wages or prohibited recruitment fees if required   | 29 CFR § 503.20(a)           | No statute          |
| 120   | Pay civil monetary penalties up to \$10,000 for any substantial violation if required   | 29 CFR § 503.26              | No statute          |
| 121   | Pay civil monetary penalties within 30 days   | 29 CFR § 503.26              | No statute          |
| <b>Department of Homeland Security Employer Rules</b> |   |                              |                     |
| 122   | File a Form I-129 Petition for a nonimmigrant worker  | 8 CFR § 214.2(h)(2)(i)(A)    | 8 USC § 1184(c)(1)  |
| 123   | Only include multiple workers on a single petition if they will have the same job in the same location for the same period  | 8 CFR § 214.2(h)(2)(iii)     | No statute          |
| 124   | Prove temporary need to USCIS   | 8 CFR 214.2(h)(6)(ii)(B)     | No statute          |
| 125   | Name all foreign worker beneficiaries of a petition who are in the United States  | 8 CFR § 214.2(h)(2)(iii)     | No statute          |
| 126   | State the nationalities of the beneficiaries even if they are not named   | 8 CFR § 214.2(h)(2)(iii)     | No statute          |
| 127   | Name all foreign worker beneficiaries of a petition who are not from a designated participating country   | 8 CFR § 214.2(h)(2)(iii)     | No statute          |
| 128   | Reimburse all fees that a worker paid to the employer for the job   | 8 CFR § 214.2(h)(6)(i)(B)(3) | No statute          |
| 129   | Submit evidence that a worker from a country not on the participating countries list is in the national interest by proving that they have skills not available in other countries or evidence that they were previously in H-2B status | 8 CFR § 214.2(h)(6)(i)(E)(2) | No statute          |
| 130   | Notify DHS after a worker abandons job or fails to show for 5 business days   | 8 CFR § 214.2(h)(6)(i)(F)    | No statute          |
| 131   | Notify DHS within 2 business days after a worker abandons job or fails to show for 5 business days  | 8 CFR § 214.2(h)(6)(i)(F)    | No statute          |
| 132   | Notify DHS if the work concludes more than 30 days before the end of the petition validity period   | 8 CFR § 214.2(h)(6)(i)(F)    | No statute          |
| 133   | Notify within 2 business days DHS if the work concludes more than 30 days before the end of the petition validity period  | 8 CFR § 214.2(h)(6)(i)(F)    | No statute          |
| 134   | Demonstrate to DHS that the job will end in the near, definable future based on a one-time occurrence, a seasonal need, a peak load need, or an intermittent need   | 8 CFR § 214.2(h)(6)(i)(F)    | PL 114-113          |
| 135   | Submit the approved labor certification with the I-129H2B petition  | 8 CFR § 214.2(h)(6)(vi)(A)   | No statute          |
| 136   | Submit evidence of qualifications if the job has skill requirements   | 8 CFR § 214.2(h)(6)(vi)(C)   | No statute          |
| 137   | May not replace an H-2B worker who was admitted to the United States without submitting a newly approved labor certification  | 8 CFR § 214.2(h)(6)(vii)(A)  | No statute          |
| 138   | May not replace an H-2B worker who was not admitted without submitting an amended new petition  | 8 CFR § 214.2(h)(6)(vii)(B)  | No statute          |
| 139   | May not replace an H-2B worker who was not admitted without paying petition fees  | 8 CFR § 214.2(h)(6)(vii)(B)  | No statute          |
| 140   | File a Form I-129H2B petition to extend the stay of an H-2B worker  | 8 CFR § 214.2(h)(15)(i)      | No statute          |
| 141   | Do not employ an H-2B worker whose initial petition's validity has expired until an extension of stay is approved   | 8 CFR § 214.2(h)(15)(i)      | No statute          |
| 142   | Pay \$150 fraud fee   | 8 CFR § 106.2(c)(5)(ii)      | 8 USC § 1184(c)(13) |
| 143   | Pay petition fee of \$715 for named beneficiaries   | 8 CFR § 106.2(a)(3)(iv)      | No statute          |
| 144   | Pay petition fee of \$385 for unnamed beneficiaries   | 8 CFR § 106.2(a)(3)(v)       | No statute          |
| 145   | Pay a premium processing fee of \$1,440 to receive adjudication in 15 business days   | 8 CFR § 103.7(b)(1)(i)(SS)   | No statute          |
| 146   | Sign the petition   | 8 CFR § 103.2(a)(2)          | No statute          |



Table A (continued)

**H-2B program requirements**

|   | Requirement   | Regulation                      | Statute                    |
|---|---|---------------------------------|----------------------------|
| <b>Department of Homeland Security Employer Rules (continued)</b> |   |                                 |                            |
| 147   | Respond to a request for evidence within the specified time period (never more than 120 days, usually 30 days)  | 8 CFR § 103.2(b)                | No statute                 |
| 148   | Appeal to Administrative Appeals Office on Form I-290B within 30 business days  | 8 CFR § 103.3(a)(2)(i)          | No statute                 |
| 149   | If requesting a supplemental cap position, file a Form I-129H2B petition with attestation of severe financial loss  | 84 FR 20020                     | PL 116-94                  |
| 150   | May not receive an approved petition for cap subject H-2B workers without a cap number being available  | 8 CFR § 214.2(h)(8)             | 8 USC § 1184(g)(1)(B)      |
| <b>Department of State Worker Rules</b>                           |   |                                 |                            |
| 151   | File a DS-160 nonimmigrant visa application at a U.S. embassy or consulate  | 9 FAM 403.2-5(A)a.              | 8 USC § 1202               |
| 152   | Provide an approved employer I-129 petition   | 9 FAM 403.9-5(E)a.              | 8 USC § 1184(a)(1)         |
| 153   | Demonstrate a foreign residence   | 9 FAM 401.1-3(F)(1)             | 8 USC § 1101(a)(H)(ii)(b)  |
| 154   | Demonstrate an intention to return home (through permanent employment, meaningful business or financial connections, close family ties, or social or cultural associations) | 9 FAM 401.1-3(F)(2)b            | 9 USC § 1101(a)(H)(ii)(b)  |
| 155   | Do not plan to adjust to legal permanent residence or have an immigrant visa petition pending   | 9 FAM 402.10-10(A)b.            | 10 USC § 1101(a)(H)(ii)(b) |
| 156   | Be interviewed at a consulate or embassy abroad unless reapplying within 12 months (in 2020, expanded to 24 months)   | 9 FAM 403.5-2(U)b               | 8 USC § 1202(h)            |
| 157   | Provide biometrics (10 fingerprints and digital photograph)   | 9 FAM 403.2-3a(3)               | 8 USC § 1732(b)(1)         |
| 158   | Pay the machine-readable visa (MRV) processing fee of \$190   | 22 CFR 22.1.21(b)               | 8 USC § 1713(b)            |
| 159   | Do not apply for an H-2B visa earlier than 90 days prior to the job start   | 9 FAM 402.10-11b.(2)            | No statute                 |
| 160   | Do not attempt to use visa earlier than 10 days before date of employer's need  | 9 FAM 402.10-11b.(2)            | No statute                 |
| <b>Department of Homeland Security Worker Rules</b>               |   |                                 |                            |
| 161   | Enter only after becoming the beneficiary of an approved I-129 petition for nonimmigrant worker   | 8 CFR § 214.2(h)(1)(i)          | 8 USC § 1184(c)(1)         |
| 162   | Enter no earlier than 10 days prior to the date of need   | 8 CFR § 214.2(h)(13)(i)(A)      | No statute                 |
| 163   | Do not attempt to simultaneously receive U.S. legal permanent residence as receive H-2B status  | 8 CFR § 214.2(h)(16)(ii)        | No statute                 |
| 164   | File an extension of stay request if a second H-2B employer is found  | 8 CFR § 214.2(h)(14)            | No statute                 |
| 165   | Leave country or find new job no later than 10 days after completing the end of initial job   | 8 CFR § 214.2(h)(13)(i)(A)      | No statute                 |
| 166   | Leave country after three continuous years in status unless regularly commuting   | 8 CFR § 214.2(h)(13)(iv)        | No statute                 |
| 167   | Remain outside the country for not less than three months after 3 continuous years in H-2B status   | 8 CFR § 214.2(h)(13)(iv)        | No statute                 |
| 168   | Leave country if employer petition is revoked   | 8 CFR § 214.2(h)(6)(i)(C)       | No statute                 |
| 169   | Work only for an employer with an approved H-2B petition  | 8 CFR § 274a.12(b)(9)           | No statute                 |
| 170   | Do not abandon the H-2B job without leaving the country or immediately finding a new H-2B job or the petition will be revoked and status terminated                         | 8 CFR § 214.2(h)(11)(iii)(A)(1) | 8 USC § 1227(a)(1)(C)      |
| 171   | Report change of U.S. address within 10 days  | 8 CFR § 265.1                   | 8 USC § 1305(a)            |
| 172   | Enter at port of entry  | 8 CFR § 235.1(a)                | 8 USC § 1182(a)(6)(A)(i)   |
| 173   | Present documents at port of entry (passport with H-2B visa)  | 8 CFR § 212.1                   | 8 USC § 1732(b)(2)         |
| 174   | Submit biometrics (fingerprints and photograph) at port of entry  | 8 CFR § 235.1(f)(1)(ii)         | 8 USC § 1732(b)(2)         |
| 175   | Be inspected by a CBP officer   | 8 CFR § 235.1(a)                | 8 USC § 1225(a)(3)         |
| 176   | Pay \$6 fee per worker for a form I-94 entry record (employer must pay or reimburse)  | 8 CFR § 103.7(d)(4)             | No statute                 |

Table B

**Cap reach dates for the H-2B program**

| Fiscal Year | Cap reach date                                  |  | Days between reach date and first entry date    |  |
|-------------|---|--|---|--|
|             | First half (October 1 through March 31)         | Second half (April 1 through September 30) | First half (October 1 through March 31)         | Second half (April 1 through September 30) |
| 2020        | November 15, 2019                               | February 18, 2020                          | 45  | -43  |
| 2019        | December 6, 2018                                | February 19, 2019                          | 66  | -41  |
| 2018        | December 15, 2017                               | February 26, 2018                          | 75  | -34  |
| 2017        | January 10, 2017                                | March 13, 2017                             | 101   | -19  |
| 2016        | March 15, 2016                                  | March 15, 2016                             | 166   | -17  |
| 2015        | January 26, 2015                                | March 26, 2015                             | 117   | -6   |
| 2014        | March 14, 2014                                  | Not hit                                    | 164   |  |
| 2010        | Not hit   | Not hit                                    | Not hit   | Not hit                                    |
| 2009        | July 29, 2008                                   | January 7, 2009                            | -64   | -84  |
| 2008        | September 27, 2007                              | January 2, 2008                            | -4  | -90  |
| 2007        | November 28, 2006                               | March 16, 2007                             | 58  | -16  |
| 2006        | December 15, 2005                               | April 4, 2006                              | 75  | 3  |
|             | <b>Full year (October through September 30)</b> |  | <b>Full year (October through September 30)</b> |  |
| 2005        | January 4, 2005                                 |  | 95  |  |
| 2004        | March 10, 2004                                  |  | 161   |  |
| 1992-2003   | Not hit   |  | Not hit   |  |

Sources: U.S. Citizenship and Immigration Services, "H-2B Usage and Recommendations," Department of Homeland Security, July 22, 2016; and U.S. Citizenship and Immigration Services, "USCIS Reaches H-2B Cap," 2016-2020.

Table C

**H-2B program participation statistics by year**

|      | Jobs requested | Jobs certified | CBP admissions | Visa exempt admissions | Changes of status | Visas   | Petitions |
|------|----------------|----------------|----------------|------------------------|-------------------|---------|-----------|
| 1987 | N/A            | N/A            | 0              | N/A                    | N/A               | 62      | N/A       |
| 1988 | N/A            | N/A            | 22,115         | N/A                    | N/A               | 683     | N/A       |
| 1989 | N/A            | N/A            | 19,058         | N/A                    | N/A               | 9,575   | N/A       |
| 1990 | N/A            | N/A            | 23,047         | N/A                    | N/A               | 11,843  | N/A       |
| 1991 | N/A            | N/A            | 21,485         | N/A                    | N/A               | 14,573  | N/A       |
| 1992 | N/A            | N/A            | 18,029         | N/A                    | N/A               | 12,552  | N/A       |
| 1993 | N/A            | N/A            | 15,038         | N/A                    | N/A               | 9,691   | N/A       |
| 1994 | N/A            | N/A            | 15,687         | N/A                    | N/A               | 10,400  | N/A       |
| 1995 | N/A            | N/A            | 14,193         | N/A                    | N/A               | 11,737  | N/A       |
| 1996 | N/A            | N/A            | 14,345         | N/A                    | N/A               | 12,200  | N/A       |
| 1997 | 35,773         | N/A            | 19,620         | N/A                    | N/A               | 15,706  | N/A       |
| 1998 | 41,270         | N/A            | 24,895         | N/A                    | N/A               | 20,192  | N/A       |
| 1999 | 63,079         | N/A            | 35,815         | N/A                    | N/A               | 30,642  | N/A       |
| 2000 | 103,280        | N/A            | 51,462         | N/A                    | N/A               | 45,037  | N/A       |
| 2001 | 132,598        | 115,423        | 72,387         | N/A                    | N/A               | 58,215  | N/A       |
| 2002 | 139,223        | 121,931        | 86,987         | N/A                    | N/A               | 62,591  | N/A       |
| 2003 | 164,550        | 144,371        | 102,833        | N/A                    | N/A               | 78,955  | N/A       |
| 2004 | 203,450        | 168,471        | 86,958         | N/A                    | N/A               | 76,169  | N/A       |
| 2005 | 151,182        | 134,837        | N/A            | 2,518                  | 1,667             | 89,135  | N/A       |
| 2006 | 247,287        | 199,734        | 97,279         | 2,699                  | 1,944             | 122,541 | N/A       |
| 2007 | 360,147        | 254,615        | 75,727         | 3,295                  | 2,218             | 129,547 | N/A       |
| 2008 | 292,645        | 250,343        | 104,618        | 909                    | 636               | 94,304  | N/A       |
| 2009 | 218,274        | 154,489        | 56,381         | 602                    | 415               | 44,847  | N/A       |
| 2010 | 113,031        | 93,599         | 69,395         | 261                    | 474               | 47,403  | N/A       |
| 2011 | 97,267         | 83,152         | 79,794         | 449                    | 376               | 50,826  | N/A       |
| 2012 | 94,538         | 75,458         | 82,906         | 227                    | 354               | 50,009  | N/A       |
| 2013 | 98,402         | 82,307         | 104,984        | 193                    | 333               | 57,600  | N/A       |
| 2014 | 107,784        | 93,649         | 105,413        | 223                    | 358               | 68,102  | N/A       |
| 2015 | 126,138        | 101,765        | 120,207        | 268                    | 228               | 69,684  | 5,412     |
| 2016 | 143,311        | 119,232        | 119,446        | 296                    | 280               | 84,627  | 6,527     |
| 2017 | 165,184        | 133,985        | 124,319        | 324                    | 113               | 83,600  | 6,112     |
| 2018 | 194,384        | 147,592        | 120,351        | 702                    | 276               | 83,774  | 6,148     |
| 2019 | 189,187        | 150,465        | 129,120        | 1,242                  | 146               | 97,623  | 7,460     |
| 2020 | 160,557        | 134,635        | N/A            | 3,203                  | 107               | 62,001  | 4,108     |

Sources: Office of Foreign Labor Certification (OFLC), "Performance Data: Disclosure Data," Foreign Labor Certification, Employment and Training Administration, Department of Labor; OFLC, "H-2B Program Data," 2007; "Nonimmigrant Visa Statistics," Department of State; Department of Homeland Security, Yearbook of Immigration Statistics (Washington: Department of Homeland Security, 2002); Department of State; "Reports and Studies—USCIS Program Reports: H-2B," U.S. Citizenship and Immigration Services; and CATA v. Solis, Civil No. 09-CV-240, August 17, 2009.

Note: The 2020 Customs and Border Protection data are through March; Department of Labor data are through June; visa data are through July; and petitions are through June.

Table D

**H-2B program employer enforcement statistics**

|      | Violators | Debarred | Violations | Penalties   | Backpay     | Revoked petitions | RFEs  | Approval after RFE | Petitions denied | Petition denial rate | RFE rate |
|------|-----------|----------|------------|-------------|-------------|-------------------|-------|--------------------|------------------|----------------------|----------|
| 2005 | 0         | 0        | 0          | 0           | 0           | 111               | N/A   | N/A                | N/A              | N/A                  | N/A      |
| 2006 | 0         | 0        | 0          | 0           | 0           | 63                | N/A   | N/A                | N/A              | N/A                  | N/A      |
| 2007 | 0         | 0        | 0          | 0           | 0           | 135               | N/A   | N/A                | N/A              | N/A                  | N/A      |
| 2008 | 7         | 0        | 84         | \$17,000    | \$14,700    | 59                | N/A   | N/A                | N/A              | N/A                  | N/A      |
| 2009 | 38        | 0        | 633        | \$473,742   | \$306,809   | 62                | N/A   | N/A                | N/A              | N/A                  | N/A      |
| 2010 | 75        | 0        | 1815       | \$1,096,897 | \$1,092,012 | 84                | N/A   | N/A                | N/A              | N/A                  | N/A      |
| 2011 | 56        | 5        | 978        | \$496,431   | \$445,125   | 53                | N/A   | N/A                | N/A              | N/A                  | N/A      |
| 2012 | 62        | 1        | 1777       | \$738,577   | \$1,133,515 | 42                | N/A   | N/A                | N/A              | N/A                  | N/A      |
| 2013 | 45        | 4        | 1033       | \$307,164   | \$793,231   | 30                | N/A   | N/A                | N/A              | N/A                  | N/A      |
| 2014 | 31        | 25       | 834        | \$411,449   | \$633,662   | 23                | N/A   | N/A                | N/A              | N/A                  | N/A      |
| 2015 | 46        | 14       | 1801       | \$1,039,273 | \$2,661,456 | 15                | 1,111 | 967                | 165              | 3.0%                 | 21%      |
| 2016 | 57        | 0        | 2076       | \$1,396,160 | \$934,114   | 27                | 2,352 | 1,834              | 525              | 8.0%                 | 36%      |
| 2017 | 44        | 0        | 1188       | \$756,967   | \$679,328   | 15                | 1,382 | 1,084              | 307              | 5.0%                 | 23%      |
| 2018 | 13        | 4        | 109        | \$75,633    | \$53,545    | 15                | 1,158 | 1,005              | 159              | 2.6%                 | 19%      |
| 2019 | 10        | 9        | 230        | \$98,497    | \$51,483    | 25                | 1,290 | 1,178              | 118              | 1.6%                 | 17%      |
| 2020 | N/A       | 5        | N/A        | N/A         | N/A         | 7                 | 684   | 637                | 56               | 1.4%                 | 17%      |

Sources: "I-129, Petition for a Nonimmigrant Worker," U.S. Citizenship and Immigration Services, last updated October 16, 2020; "Wage and Hour Compliance Action Data," Data Enforcement, Department of Labor, updated October 15, 2020; and "Reports and Studies—USCIS Program Reports: H-2B," U.S. Citizenship and Immigration Services, 2020.

Notes: 2020 data are through June. The Department of Labor lacked H-2B enforcement authority before 2008.

Table E

**H-2B program worker enforcement statistics**

|      | Initial visa refusals | Final visa refusals | Initial refusal rate | Final refusal rate | Inadmissibles | H-2B ICE removals | Revoked petition |
|------|-----------------------|---------------------|----------------------|--------------------|---------------|-------------------|------------------|
| 2002 | 15,196                | 12,277              | 24%                  | 16%                | N/A           | N/A               | N/A              |
| 2003 | 12,873                | 8,360               | 16%                  | 10%                | N/A           | N/A               | N/A              |
| 2004 | 12,308                | 10,260              | 16%                  | 12%                | N/A           | N/A               | N/A              |
| 2005 | 19,308                | 15,599              | 22%                  | 15%                | N/A           | N/A               | 1,514            |
| 2006 | 30,851                | 26,458              | 25%                  | 18%                | N/A           | N/A               | 1,070            |
| 2007 | 28,932                | 22,654              | 22%                  | 15%                | 207           | 194               | 2,826            |
| 2008 | 19,670                | 14,807              | 21%                  | 14%                | 181           | 29                | 1,342            |
| 2009 | 19,639                | 14,802              | 44%                  | 25%                | 116           | 20                | 1,788            |
| 2010 | 16,185                | 10,861              | 34%                  | 19%                | 135           | 39                | 1,868            |
| 2011 | 12,771                | 6,929               | 25%                  | 12%                | 260           | 64                | 1,586            |
| 2012 | 11,892                | 6,213               | 24%                  | 11%                | 273           | 51                | 759              |
| 2013 | 9,981                 | 5,664               | 17%                  | 9%                 | 190           | 34                | 988              |
| 2014 | 10,533                | 6,619               | 15%                  | 9%                 | 235           | 23                | 447              |
| 2015 | 9,188                 | 6,122               | 13%                  | 8%                 | 129           | 39                | 299              |
| 2016 | 11,375                | 7,537               | 13%                  | 8%                 | 81            | 67                | 336              |
| 2017 | 9,915                 | 5,690               | 12%                  | 6%                 | 54            | 129               | 200              |
| 2018 | 10,218                | 6,685               | 12%                  | 7%                 | 47            | 251               | 138              |
| 2019 | 13,615                | 8,300               | 14%                  | 8%                 | 43            | 226               | 407              |
| 2020 | 7,570                 | 4,000               | 19%                  | 10%                | 20            | 113               | 158              |

Sources: "Reports and Studies—USCIS Program Reports: H-2B," U.S. Citizenship and Immigration Services, 2020; U.S. Citizenship and Immigration Services, "Characteristics of H-2B Nonagricultural Temporary Workers," April 29, 2020; and "Nonimmigrant Visa Statistics," Department of State.

Note: 2020 data are through March.

Table F

## National median hourly wages in the top 10 H-2B occupations by year

|                            | All jobs | Landscape | Forest  | Maids   | Meat    | Amusement | Servers | Construction | Cooks   | Freight | Animals |
|----------------------------|----------|-----------|---------|---------|---------|-----------|---------|--------------|---------|---------|---------|
| 1999                       | \$12.10  | \$8.48    | \$8.21  | \$7.03  | \$8.08  | \$6.55    | \$6.07  | \$10.85      | \$8.05  | \$8.75  | \$7.50  |
| 2000                       | \$12.55  | \$8.80    | \$8.97  | \$7.41  | \$8.06  | \$6.72    | \$6.42  | \$11.15      | \$8.72  | \$9.04  | \$7.67  |
| 2001                       | \$13.01  | \$9.19    | \$9.13  | \$7.71  | \$8.34  | \$7.02    | \$6.60  | \$11.57      | \$8.88  | \$9.35  | \$7.97  |
| 2002                       | \$13.31  | \$9.51    | \$9.12  | \$7.90  | \$8.57  | \$7.18    | \$6.80  | \$11.90      | \$9.16  | \$9.48  | \$8.21  |
| 2003                       | \$13.53  | \$9.59    | \$9.58  | \$7.98  | \$8.69  | \$7.23    | \$6.78  | \$11.86      | \$9.26  | \$9.58  | \$8.26  |
| 2004                       | \$13.98  | \$9.92    | \$9.59  | \$8.17  | \$9.36  | \$7.52    | \$6.78  | \$12.14      | \$9.47  | \$9.79  | \$8.48  |
| 2005                       | \$14.15  | \$9.94    | \$9.46  | \$8.21  | \$9.53  | \$7.65    | \$6.83  | \$12.22      | \$9.54  | \$9.91  | \$8.52  |
| 2006                       | \$14.61  | \$10.22   | \$10.01 | \$8.45  | \$9.79  | \$7.83    | \$7.14  | \$12.66      | \$9.78  | \$10.20 | \$8.72  |
| 2007                       | \$15.10  | \$10.69   | \$9.86  | \$8.82  | \$10.12 | \$8.10    | \$7.62  | \$13.13      | \$10.20 | \$10.53 | \$9.08  |
| 2008                       | \$15.57  | \$11.13   | \$10.98 | \$9.13  | \$10.49 | \$8.40    | \$8.01  | \$13.71      | \$10.57 | \$10.89 | \$9.31  |
| 2009                       | \$15.95  | \$11.29   | \$12.30 | \$9.26  | \$10.64 | \$8.71    | \$8.50  | \$14.01      | \$10.66 | \$11.11 | \$9.40  |
| 2010                       | \$16.27  | \$11.25   | \$11.49 | \$9.28  | \$10.74 | \$8.87    | \$8.81  | \$14.08      | \$10.65 | \$11.28 | \$9.40  |
| 2011                       | \$16.57  | \$11.26   | \$11.20 | \$9.32  | \$10.92 | \$8.97    | \$8.93  | \$14.30      | \$10.61 | \$11.42 | \$9.38  |
| 2012                       | \$16.71  | \$11.33   | \$11.70 | \$9.41  | \$10.98 | \$9.00    | \$8.92  | \$14.42      | \$10.59 | \$11.49 | \$9.46  |
| 2013                       | \$16.87  | \$11.51   | \$12.39 | \$9.51  | \$11.12 | \$9.05    | \$8.94  | \$14.64      | \$10.65 | \$11.52 | \$9.57  |
| 2014                       | \$17.09  | \$11.68   | \$13.06 | \$9.67  | \$11.23 | \$9.08    | \$9.01  | \$14.95      | \$10.81 | \$11.74 | \$9.78  |
| 2015                       | \$17.40  | \$12.03   | \$12.59 | \$9.97  | \$11.48 | \$9.27    | \$9.25  | \$15.34      | \$11.11 | \$12.02 | \$10.10 |
| 2016                       | \$17.81  | \$12.65   | \$12.95 | \$10.49 | \$11.77 | \$9.69    | \$9.61  | \$16.07      | \$11.61 | \$12.49 | \$10.57 |
| 2017                       | \$18.12  | \$13.31   | \$13.30 | \$10.99 | \$12.14 | \$10.13   | \$10.01 | \$16.60      | \$12.10 | \$13.00 | \$11.03 |
| 2018                       | \$18.58  | \$13.94   | \$13.20 | \$11.43 | \$12.96 | \$10.70   | \$10.47 | \$17.21      | \$12.76 | \$13.59 | \$11.42 |
| 2019                       | \$19.14  | \$14.63   | \$15.27 | \$11.95 | \$13.51 | \$11.23   | \$11.00 | \$17.72      | \$13.36 | \$14.19 | \$11.91 |
| Percentage change in wages |          |           |         |         |         |           |         |              |         |         |         |
| Since 1999                 | 58%      | 73%       | 86%     | 70%     | 25%     | 24%       | 26%     | 21%          | 66%     | 62%     | 59%     |
| Since 2011                 | 16%      | 30%       | 36%     | 28%     | 24%     | 25%       | 23%     | 24%          | 26%     | 24%     | 27%     |

Source: "Occupational Employment Statistics: OES Data," Bureau of Labor Statistics, May 2019.

Notes: The SOC categories refer to Landscaping and Groundskeeping Workers 37-3011, Forest and Conservation Workers 45-4011, Maids and Housekeeping Cleaners 37-2012, Meat, Poultry, and Fish Cutters and Trimmers 51-3022, Amusement and Recreation Attendants 39-3091, Waiters and Waitresses 35-3031, Construction Laborers 47-2061; Laborers and Freight, Stock, and Material Movers, Hand 53-7062; Cooks, Restaurant - 35-2014; Nonfarm Animal Caretakers 39-2021;

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## NOTES

- <sup>1</sup> 8 U.S.C. § 1101(a)(15)(H)(ii)(b) (2018), <https://www.govinfo.gov/content/pkg/USCODE-2018-title8/html/USCODE-2018-title8-chap12-subchapl-sec1101.htm>.
- <sup>2</sup> Proclamation No. 10052, “Suspension of Entry of Immigrants and Nonimmigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak,” 85 Fed. Reg. 38263 (June 22, 2020); and Proclamation No. 10131, “Suspension of Entry of Immigrants and Nonimmigrants Who Continue To Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak,” 86 Fed. Reg. 417 (December 31, 2020).
- <sup>3</sup> 8 U.S.C. § 1101(a)(15)(H)(ii)(b) (2018), <https://www.govinfo.gov/content/pkg/USCODE-2018-title8/html/USCODE-2018-title8-chap12-subchapl-sec1101.htm>.
- <sup>4</sup> Immigration and Nationality Act of 1952, Pub. L. No. 82–414, ch. 447, § 101(a)(15)(H) (June 27, 1952), <https://www.govinfo.gov/content/pkg/STATUTE-66/pdf/STATUTE-66-Pg163.pdf>; and Congressional Research Service, “Temporary Worker Programs: Background and Issues,” February 1980, p. 64, <https://ufdc.ufl.edu/UF00087217/00001/68j>.
- <sup>5</sup> Immigration Reform and Control Act of 1986, Pub. L. No. 99–603, § 301, 100 Stat. 3359, <https://www.govinfo.gov/content/pkg/STATUTE-100/pdf/STATUTE-100-Pg3445.pdf>; and 8 U.S.C. § 1101(a)(15)(H)(ii)(a)-(b) (2018).
- <sup>6</sup> 8 U.S.C. § 1101(a)(15)(H)(ii)(b) (2018); and 76 Fed. Reg. 3461 (January 19, 2011), <https://www.govinfo.gov/content/pkg/FR-2011-01-19/pdf/2011-1117.pdf>; as an example of a high skilled position, the Department of Labor certified four zoologists and wildlife biologists under the H-2B program in 2019—see Office of Foreign Labor Certification, “Performance Data,” Foreign Labor Certification, Employment and Training Administration, Department of Labor, <https://www.dol.gov/agencies/eta/foreign-labor/performance>.
- <sup>7</sup> Proclamation No. 10014 § 2(b), 85 Fed. Reg. 23441 (April 22, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-04-27/pdf/2020-09068.pdf>; and Department of State, “National Interest Exceptions to Presidential Proclamations (10014 & 10052) Suspending the Entry of Immigrants and Nonimmigrants Presenting a Risk to the United States Labor Market during the Economic Recovery Following the 2019 Novel Coronavirus Outbreak,” August 12, 2020, <https://travel.state.gov/content/travel/en/News/visas-news/exceptions-to-p-p-10014-10052-suspending-entry-of-immigrants-non-immigrants-presenting-risk-to-us-labor-market-during-economic-recovery.html>.
- <sup>8</sup> 73 Fed. Reg. 29942, 29944 (May 22, 2008), <https://www.govinfo.gov/content/pkg/FR-2008-05-22/pdf/E8-11214.pdf>; and 80 Fed. Reg. 24042 (April 29, 2015), <https://www.federalregister.gov/documents/2015/04/29/2015-09694/temporary-non-agricultural-employment-of-h-2b-aliens-in-the-united-states>.
- <sup>9</sup> Office of the Citizenship and Immigration Services Ombudsman, *Annual Report 2014* (Washington: Department of Homeland Security, June 27, 2014), [https://www.dhs.gov/sites/default/files/publications/cisomb/cisomb\\_2014-annual-report-to-congress.pdf](https://www.dhs.gov/sites/default/files/publications/cisomb/cisomb_2014-annual-report-to-congress.pdf).
- <sup>10</sup> “Myths vs Facts,” Seasonal Employment Alliance, 2019, <https://sealabor.com/myths-vs-facts>.
- <sup>11</sup> 20 C.F.R. § 655.1(a) (2018), <https://www.law.cornell.edu/cfr/text/20/655.1>.
- <sup>12</sup> Employment and Training Administration, “Filing Tips and Best Practices for H-2B Labor Certification Applications,” Department of Labor, October 25, 2017, [https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2B\\_Stakeholder\\_Webinar\\_10-2017.pdf](https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2B_Stakeholder_Webinar_10-2017.pdf).
- <sup>13</sup> Using the hourly rates removes outlier annual wages and makes for an easier comparison across years. Office of Foreign Labor Certification, “Performance Data.”
- <sup>14</sup> David J. Bier, “H-2B Guest Worker Wages Exceed Every State Minimum, 60% Higher on Average,” *Cato at Liberty* (blog), Cato Institute, February 12, 2020.



<sup>15</sup> 20 C.F.R. § 655.10(b); private wage surveys are authorized under Consolidated Appropriations Act of 2016, Pub. L. 114–113, 129 Stat. 2599 §112 (December 18, 2015) <https://www.congress.gov/114/plaws/publ113/PLAW-114publ113.pdf>; and Office of Foreign Labor Certification, “Performance Data.”

<sup>16</sup> 20 C.F.R. § 655.731(a)(2)(ii) (2018). The DOL has commented that in the H-2B program, “oversight at the Federal level is essential to ensuring that the job opportunities are advertised and paid at the required wage and therefore does not adversely affect U.S. worker wages,” but has not offered an explanation for why this is not the case for the H-1B program. 73 Fed. Reg. 78020, 78028 (December 19, 2008), <https://www.govinfo.gov/content/pkg/FR-2008-12-19/pdf/E8-29995.pdf>.

<sup>17</sup> 20 C.F.R. § 655.10(b)(2) (2018); and 80 Fed. Reg. 24146, 24159 (April 29, 2015), <https://www.govinfo.gov/content/pkg/FR-2015-04-29/pdf/2015-09692.pdf>.

<sup>18</sup> David J. Bier, “100% of H-1B Employers Offer Average Market Wages—78% Offer More,” *Cato at Liberty* (blog), Cato Institute, May 18, 2020.

<sup>19</sup> 20 C.F.R. § 655.10(d) (2018), <https://www.law.cornell.edu/cfr/text/20/655.10>.

<sup>20</sup> 20 C.F.R. § 655.5 (2018).

<sup>21</sup> 20 C.F.R. § 655.10(b)(2) (2018), <https://www.law.cornell.edu/cfr/text/20/655.10>; and 78 Fed. Reg. 24047, 24052 (April 24, 2013), <https://www.govinfo.gov/content/pkg/FR-2013-04-24/pdf/2013-09723.pdf>.

<sup>22</sup> 78 Fed. Reg. 24047, 24053 (April 24, 2013); and 20 C.F.R. § 656.40(d)(1) (2018).

<sup>23</sup> 78 Fed. Reg. 24047, 24051 (April 24, 2013), <https://www.govinfo.gov/content/pkg/FR-2013-04-24/pdf/2013-09723.pdf>; an October 2020 proposed regulation would alter how the skill levels are created under the H-1B program—see Office of Foreign Labor Certification, “Wage Library,” 2020, <http://web.archive.org/web/20201006170635/https://www.flcdatacenter.com/OesQuickResults.asp> and the Department of Labor changed how it calculates the entry level prevailing wage in October 2020—see 85 Fed. Reg. 63872 (October 8, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-10-08/pdf/2020-22132.pdf>.

<sup>24</sup> “Occupational Employment Statistics, May 2019: 47–2051 Cement Masons and Concrete Finishers,” Occupational Employment Statistics, Bureau of Labor Statistics, modified July 6, 2020, <https://www.bls.gov/oes/current/oes472051.htm>.

<sup>25</sup> 20 C.F.R. § 655.15(e) (2018).

<sup>26</sup> 20 C.F.R. § 655.15(f) (2018); Employment and Training Administration, “Training and Employment Guidance Letter No. 27–06,” Department of Labor, June 12, 2007, [http://web.archive.org/web/20170711205030/https://wdr.doleta.gov/directives/corr\\_doc.cfm?DOCN=2446](http://web.archive.org/web/20170711205030/https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=2446); and Employment and Training Administration, “Training and Employment Guidance Letter No. 31–05,” May 31, 2006, [http://web.archive.org/web/20170711205017/https://wdr.doleta.gov/directives/corr\\_doc.cfm?DOCN=2228](http://web.archive.org/web/20170711205017/https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=2228).

<sup>27</sup> Many states allow employer to preload a job order to post on a certain date, so this may effectively be prepared before the 90-day limit in the law. 20 C.F.R. § 655.16(a)(1) (2018); and “About NASWA,” National Association of State Workforce Agencies.

<sup>28</sup> 20 C.F.R. § 655.16(b) (2018).

<sup>29</sup> 20 C.F.R. § 655.20(d); and 20 C.F.R. § 655.5 (2018). A 2008 regulation had defined full-time to mean 30 hours or more per week—see 73 Fed. Reg. 78020, 78054 (December 19, 2008), <https://www.govinfo.gov/content/pkg/FR-2008-12-19/pdf/E8-29995.pdf>.

<sup>30</sup> 20 C.F.R. § 655.15(b) (2018); and 8 C.F.R. 214.2(h)(6)(ii)(B) (2018).

<sup>31</sup> 8 C.F.R. 214.2(h)(6)(ii)(B) (2018); and note that 20 C.F.R. § 655.6(b) (2018) contains a nine-month restriction that Congress has barred—see Further Consolidated Appropriations Act of 2020, Pub. L. 116–94 (December 20, 2019), <https://www.congress.gov/116/plaws/publ94/PLAW-116publ94.pdf>.

- <sup>32</sup> 8 C.F.R. § 214.2(h)(6)(iv)(B): “The Secretary of Labor may issue a temporary labor certification for a period of up to one year”; and 20 C.F.R. § 655.103(d) (2019).
- <sup>33</sup> Office of Foreign Labor Certification, “Performance Data.”
- <sup>34</sup> 20 C.F.R. § 655.33(b) (2018).
- <sup>35</sup> 20 C.F.R. § 655.40; and 20 C.F.R. § 655.43 (2018).
- <sup>36</sup> 20 C.F.R. § 655.40(c) (2018).
- <sup>37</sup> H-2B Workforce Coalition, “RE: RIN 1205-AB58 – Temporary Non-Agricultural Employment of H-2B Aliens in the United States,” May 17, 2011, [https://web.archive.org/web/20200911171451/https://cdn.ymaws.com/www.oan.org/resource/resmgr/1205-AB58\\_H2B\\_Policies.pdf](https://web.archive.org/web/20200911171451/https://cdn.ymaws.com/www.oan.org/resource/resmgr/1205-AB58_H2B_Policies.pdf).
- <sup>38</sup> For example: Texas Labor Code § 207.047 (effective Sept. 1, 1993), [https://texas.public.law/statutes/tex.\\_labor\\_code\\_section\\_207.047](https://texas.public.law/statutes/tex._labor_code_section_207.047).
- <sup>39</sup> “Employment Situation News Release,” Bureau of Labor Statistics, June 3, 2011, [https://www.bls.gov/news.release/archives/empsit\\_06032011.htm](https://www.bls.gov/news.release/archives/empsit_06032011.htm); and ImmigrationWorksUSA, “Responses to IW H-2B Survey,” April–May 2011, <https://www.immigrationworksusa.org/uploaded/Responses%20to%20IW%20H-2B%20Survey.pdf>.
- <sup>40</sup> Office of Advocacy, “Letter Dated 10/27/10—Department of Labor, Employment and Training Administration,” Small Business Administration, October 27, 2010, <https://www.sba.gov/content/letter-dated-102710-department-labor-employment-and-training-administration-1>.
- <sup>41</sup> 20 C.F.R. § 655.20(p) (2018); Employment and Training Administration, “Notice of Acceptance: H-2B Temporary Non-Agricultural Program,” Department of Labor, July 7, 2020, <https://www.cato.org/sites/cato.org/files/2020-09/Notice%20of%20Acceptance%20July%207%202020.PNG>.
- <sup>42</sup> 20 C.F.R. § 655.45(b) (2018); and 20 C.F.R. § 655.48(a) (2018).
- <sup>43</sup> Office of Foreign Labor Certification, “H-2B Temporary Non-Agricultural Program—Selected Statistics, Fiscal Year (FY) 2020 Q1–Q3,” Employment and Training Administration, Department of Labor, 2020, [https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2B\\_Selected\\_Statistics\\_FY2020\\_Q3.pdf](https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2B_Selected_Statistics_FY2020_Q3.pdf).
- <sup>44</sup> 77 Fed. Reg. 59670 (September 28, 2012), <https://www.govinfo.gov/content/pkg/FR-2012-09-28/pdf/2012-23884.pdf>; and 80 Fed. Reg. 24042, 24043 (April 29, 2015), <https://www.govinfo.gov/content/pkg/FR-2015-04-29/pdf/2015-09694.pdf>.
- <sup>45</sup> Office of Foreign Labor Certification, “H-2B Temporary Non-Agricultural Program.”
- <sup>46</sup> Department of Labor Office of Inspector General, “ETA’s Lack of Key Controls over the H-2B Application Process Jeopardized Businesses That Depend on H-2B Workers,” Report no. 06–18–002–03–321, September 28, 2018, <https://www.oig.dol.gov/public/reports/oa/2018/06-18-002-03-321.pdf>.
- <sup>47</sup> Immigration Act of 1990, Pub. L. 101–649, 104 Stat. 4979 § 205 and § 231 (November 29, 1990), <https://www.govinfo.gov/content/pkg/STATUTE-104/pdf/STATUTE-104-Pg4978.pdf>.
- <sup>48</sup> 8 U.S.C. § 1184(g)(10) (2018); Save Our Small and Seasonal Businesses Act of 2005, Pub. L. 109–13, 119 Stat. 318 (May 11, 2005), <https://www.govinfo.gov/content/pkg/PLAW-109publ13/pdf/PLAW-109publ13.pdf>.
- <sup>49</sup> 20 C.F.R. § 655.15(b) (2018).

<sup>50</sup> 83 Fed. Reg. 3189, 3190 (January 23, 2018), <https://www.govinfo.gov/content/pkg/FR-2018-01-23/pdf/2018-01166.pdf>.

<sup>51</sup> Office of Foreign Labor Certification, “U.S. Department of Labor Announces Updates to the H-2B Temporary Labor Certification Program,” Department of Labor, February 26, 2019, [https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/OFLC\\_Procedural-Change\\_H-2B\\_Application-Assignment\\_02.26.19.pdf](https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/OFLC_Procedural-Change_H-2B_Application-Assignment_02.26.19.pdf); and 84 Fed. Reg. 7399 (March 4, 2019), <https://www.govinfo.gov/content/pkg/FR-2019-03-04/pdf/2019-03809.pdf>.

<sup>52</sup> Office of Foreign Labor Certification, “H-2B Non-Agricultural Visa Program—Selected Statistics, FY 2012 YTD,” Employment and Training Administration, Department of Labor, September 16, 2012, [https://web.archive.org/web/20130205020029/http://www.foreignlaborcert.doleta.gov/pdf/h\\_2b\\_t\\_emp\\_non\\_agricultural\\_visa.pdf](https://web.archive.org/web/20130205020029/http://www.foreignlaborcert.doleta.gov/pdf/h_2b_t_emp_non_agricultural_visa.pdf); and Office of Foreign Labor Certification, “H-2B Temporary Non-Agricultural Labor Certification Program—Selected Statistics, FY 2019 EOY,” September 30, 2019, [https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2B\\_Selected\\_Statistics\\_FY2019\\_Q4.pdf](https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2B_Selected_Statistics_FY2019_Q4.pdf).

<sup>53</sup> 20 C.F.R. § 655.40(c) (2018); and 20 C.F.R. § 655.52 (2018).

<sup>54</sup> 8 C.F.R. § 214.2(h)(8)(vii) (2018).

<sup>55</sup> 8 U.S.C. § 1184(g)(1)(B) (2018).

<sup>56</sup> 48 U.S.C. § 1806(a)(2) as amended by Northern Mariana Islands U.S. Workforce Act of 2018, Pub. L. 115–218, 132 Stat. 1547 § 3 (July 25, 2018); 48 U.S.C. § 1806(b); and Department of Defense Appropriations Act of 2005, Pub. L. 108–287, 118 Stat. 1014 § 14006 (August 5, 2004), <https://www.congress.gov/108/plaws/publ287/PLAW-108publ287.pdf>; and 354 jobs were certified in roe occupations in 2019—see Office of Foreign Labor Certification, “Performance Data.”

<sup>57</sup> 8 C.F.R. § 214.2(h)(8)(vii) (2018).

<sup>58</sup> “Some employers stated that they would prefer that DHS use a more equitable method to award and distribute visas, such as giving every employer a proportion of the visas they petition for.” Government Accountability Office, “H-2B Visas: Additional Steps Needed to Meet Employers’ Hiring Needs and Protect U.S. Workers,” GAO-20–230, April 2020, <https://www.gao.gov/assets/710/705639.pdf>.

<sup>59</sup> 8 C.F.R. § 214.2(h)(8)(vii) (2018).

<sup>60</sup> Since the cap applies only to workers who actually receive visas or status—a later stage in the process—USCIS must estimate how many petitions it must approve to fill the cap. It generally approves petitions for between 20 and 25 percent more workers than the cap permits because some workers are denied visas or status, and some employers hire fewer workers than they requested. The agency has twice miscalculated how many petitions were needed (in 2009 and 2015) and reopened the cap to allow more petitions later in the year. U.S. Citizenship and Immigration Services, “H-2B Usage and Recommendations,” Department of Homeland Security, July 22, 2016, <https://www.dhs.gov/sites/default/files/publications/U.S.%20Citizenship%20and%20Immigration%20%20H-2B%20Usage%20and%20Recommendations.pdf>.

<sup>61</sup> Save Our Small and Seasonal Businesses Act of 2005, Pub. L. 109–13, 119 Stat. 318 (May 11, 2005); and John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. 109–364, 120 Stat. 2095 § 1074 (October 17, 2006), <https://www.congress.gov/109/plaws/publ364/PLAW-109publ364.htm>. In 2008, employers submitted nearly as many job requests because they expected another “returning worker” exemption, but members of Congress wanting to force a vote on comprehensive immigration reform objected and managed to stop the extension. David Holthouse, “Visa Fight Leaves Businesses Short Summer Workers,” CNN, April 18, 2008, [https://money.cnn.com/2008/04/16/smbusiness/h2b\\_visas.fsb/index.htm?postversion=2008041810](https://money.cnn.com/2008/04/16/smbusiness/h2b_visas.fsb/index.htm?postversion=2008041810).

<sup>62</sup> Consolidated Appropriations Act of 2016, Pub. L. 114–113, 129 Stat. 2523 §565 (December 18, 2015), <https://www.govinfo.gov/content/pkg/PLAW-114publ113/pdf/PLAW-114publ113.pdf>; “Nonimmigrant Visa Statistics,” U.S. Visa Law and Policy, Bureau of Consular Affairs, Department of State, <https://travel.state.gov/content/travel/en/legal/visa-lawO/visa-statistics/nonimmigrant-visa-statistics.html>.

<sup>63</sup> Consolidated Appropriations Act of 2017, Pub. L. 115–31, 131 Stat. 432 § 543 (May 5, 2017), <https://www.congress.gov/115/plaws/publ31/PLAW-115publ31.pdf>; 82 Fed. Reg. 32987, 32988 (July 19, 2017), <https://www.federalregister.gov/documents/2017/07/19/2017-15208/exercise-of-time-limited-authority-to-increase-the-fiscal-year-2017-numerical-limitation-for-the>.

<sup>64</sup> Consolidated Appropriations Act of 2018, Pub. L. 115–141, 132 Stat. 1049 § 205 (March 23, 2018), <https://www.congress.gov/115/plaws/publ141/PLAW-115publ141.pdf>; Consolidated Appropriations Act of 2019, Pub. L. 116–6, 133 Stat. 475 § 105 (February 15, 2019), <https://www.congress.gov/116/plaws/publ6/PLAW-116publ6.pdf>; Further Consolidated Appropriations Act of 2020, Pub. L. 116–94, 133 Stat. 3019 § 105 (December 20, 2019), <https://www.congress.gov/116/plaws/publ94/PLAW-116publ94.pdf>; 82 Fed. Reg. 32987 (July 19, 2017), <https://www.govinfo.gov/content/pkg/FR-2017-07-19/pdf/2017-15208.pdf>; 83 Fed. Reg. 24905 (May 31, 2018), <https://www.govinfo.gov/content/pkg/FR-2018-05-31/pdf/2018-11732.pdf>; and 84 Fed. Reg. 20005, 20009 (May 8, 2019), <https://www.govinfo.gov/content/pkg/FR-2019-05-08/pdf/2019-09500.pdf>.

<sup>65</sup> Suzanne Monyak, “DHS Halts Extra Guestworker Visas as Unemployment Jumps,” Law360, April 2, 2020, <https://www.law360.com/articles/1259875/dhs-halts-extra-guestworker-visas-as-unemployment-jumps>.

<sup>66</sup> David J. Bier, “The Murky Origins of the H-2B Program’s Prevailing Wage Rule,” *Cato at Liberty* (blog), Cato Institute, July 23, 2020; and U.S. Citizenship and Immigration Services, “H-2B Usage and Recommendations.”

<sup>67</sup> Save Our Small and Seasonal Businesses Act of 2005, Pub. L. 109–13, 119 Stat. 318 (May 11, 2005); and John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. 109–364, 120 Stat. 2370 § 1074, <https://www.congress.gov/109/plaws/publ364/PLAW-109publ364.htm>.

<sup>68</sup> U.S. Citizenship and Immigration Services, “Characteristics of H-2B Nonagricultural Temporary Workers,” Department of Homeland Security, April 29, 2020, [https://www.uscis.gov/sites/default/files/document/data/FY\\_2019\\_H-2B\\_Characteristics\\_Report\\_Signed\\_Dated\\_4.29.20.pdf](https://www.uscis.gov/sites/default/files/document/data/FY_2019_H-2B_Characteristics_Report_Signed_Dated_4.29.20.pdf).

<sup>69</sup> In 2020, DHS finalized a rule to lower the fee for named workers, but a court has blocked implementation of the fee increase, and the Biden administration has announced that it will not implement the rule. 85 Fed. Reg. 46788, 46791 (August 3, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-08-03/pdf/2020-16389.pdf>. 86 Fed. Reg. 7493 (January 29, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-01-29/pdf/2021-02044.pdf>.

<sup>70</sup> In 2020, DHS finalized a rule to increase the fee for named workers and limit the number of named workers on a petition, but a court has blocked implementation of the fee increase, and the Biden administration has announced that it will not implement the rules. 85 Fed. Reg. 46788, 46862 (August 3, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-08-03/pdf/2020-16389.pdf>. 86 Fed. Reg. 7493 (January 29, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-01-29/pdf/2021-02044.pdf>.

<sup>71</sup> Continuing Appropriations Act, 2021 and Other Extensions Act, Pub. L. 116–159, 134 Stat. 709, (October 1, 2020), <https://www.congress.gov/116/plaws/publ159/PLAW-116publ159.pdf>.

<sup>72</sup> U.S. Citizenship and Immigration Services, “I-129—Petition for a Nonimmigrant Worker Specialty Occupations (H-1B) by Fiscal Year, Month, and Case Status: October 1, 2014–June 30, 2020,” August 18, 2020, [https://www.uscis.gov/sites/default/files/document/data/I129\\_Quarterly\\_Request\\_for\\_Evidence\\_FY2015\\_FY2020\\_Q3.pdf](https://www.uscis.gov/sites/default/files/document/data/I129_Quarterly_Request_for_Evidence_FY2015_FY2020_Q3.pdf).

<sup>73</sup> 8 C.F.R. § 214.2(h)(6)(ii)(B) (2018).

<sup>74</sup> Office of the Citizenship and Immigration Services Ombudsman, *Annual Report 2015* (Washington: Department of Homeland Security, June 29, 2015), [https://www.dhs.gov/sites/default/files/publications/cisomb/cisomb\\_2015-annual-report-to-congress.pdf](https://www.dhs.gov/sites/default/files/publications/cisomb/cisomb_2015-annual-report-to-congress.pdf); and Office of the Citizenship and Immigration Services Ombudsman, *Annual Report 2016* (Washington: Department of Homeland Security, June 29, 2016), [https://www.dhs.gov/sites/default/files/publications/cisomb/cisomb\\_2016-annual-report-to-congress.pdf](https://www.dhs.gov/sites/default/files/publications/cisomb/cisomb_2016-annual-report-to-congress.pdf).

<sup>75</sup> U.S. Citizenship and Immigration Services, “I-129—Petition for a Nonimmigrant Worker.”

<sup>76</sup> Canadian and Bermudan citizens, Bahamian nationals, and British subjects resident in certain Caribbean islands. All H-2B visa exempt admissions are from Canada and have risen more than tenfold from 296 in 2016 to 3,203 in the first half of 2020. 8 C.F.R. § 212.1(a)-(b); U.S. Citizenship and Immigration Services, “H-2B Nonagricultural Temporary Worker Visa and Status,” September 14, 2020, [https://www.uscis.gov/sites/default/files/document/reports/H-2B\\_FY20\\_Semiannual\\_Report\\_to\\_Congress](https://www.uscis.gov/sites/default/files/document/reports/H-2B_FY20_Semiannual_Report_to_Congress) and U.S. Citizenship and Immigration Services, “Characteristics of H-2B Nonagricultural Temporary Workers,” July 14, 2017, <https://www.uscis.gov/sites/default/files/document/data/h-2b-fy2016-characteristics-report.pdf>.

<sup>77</sup> “Workers must prove that at least two of the following criteria apply: The applicant was previously employed and trained by the petitioning U.S. employer. The applicant must have previously worked for the petitioning U.S. employer under two or more H-2B (named or unnamed) petitions. U.S. employers dedicate substantial time and resources to training seasonal/temporary staff, and denying visas to the most experienced returning workers may cause financial hardship to the U.S. business. The applicant is traveling based on a temporary labor certification that reflects continued need for the worker. TLCs approved by DOL during or after July 2020 are more likely to account for the effects of the COVID-19 pandemic on the U.S. labor market and the petitioner’s business, and therefore this indicator is only present for cases with a TLC approved during or after July 2020 as there is an indication that the petitioner still has a need for the H-2B worker. For TLCs approved by DOL before July 2020, this indicator is only met if the consular officer can determine from the visa application the continuing need of petitioned workers with the U.S. employer. Denial of the visa pursuant to P.P. 10052 will cause financial hardship to the U.S. employer. The following examples, to be assessed based on information from the visa application, are illustrative of what may constitute a financial hardship for an employer if a visa is denied: the employer’s inability to meet financial or contractual obligations; the employer’s inability to continue its business; or a delay or other impediment to the employer’s ability to return to its pre-COVID-19 level of operations.” Proclamation No. 10014 § 2(b), 85 Fed. Reg. 23441 (April 22, 2020); and Department of State, “National Interest Exceptions to Presidential Proclamations (10014 & 10052).”

<sup>78</sup> 22 C.F.R. § 22.1.21(b) (2018); and 20 C.F.R. § 655.20(j)(2) (2018).

<sup>79</sup> “Expansion of Interview Waiver Eligibility,” U.S. Visas, Bureau of Consular Affairs, Department of State, August 25, 2020, <https://travel.state.gov/content/travel/en/News/visas-news/expansion-of-interview-waiver-eligibility.html>.

<sup>80</sup> 22 C.F.R. § 41.53(c) (2018).

<sup>81</sup> U.S. Citizenship and Immigration Services, “Characteristics of H-2B Nonagricultural Temporary Workers,” April 29, 2020.

<sup>82</sup> “Reasons for a visa refusal typically include matters outside of the scope of USCIS petition adjudication, such as determinations of inadmissibility, findings of immigrant intent under section 214(b) of the INA, or findings that the petitioning employer or an agent, facilitator, recruiter, or similar employment service required the prospective H-2B worker to pay a prohibited fee at any time as a condition of employment.” U.S. Citizenship and Immigration Services, “Characteristics of H-2B Nonagricultural Temporary Workers,” April 29, 2020.

<sup>83</sup> Department of State, “Residence Abroad Defined,” 9 FAM 401.1–3(F)(2) (October 20, 2016), <https://fam.state.gov/fam/09FAM/09FAM040101.html>.

<sup>84</sup> Office of the Citizenship and Immigration Services Ombudsman, *Annual Report 2012* (Washington: Department of Homeland Security, June 25, 2012), <https://www.dhs.gov/sites/default/files/publications/cisomb-2012-annualreport.pdf>.

<sup>85</sup> Office of the Citizenship and Immigration Services Ombudsman, *Annual Report 2014*.

<sup>86</sup> “While the agencies do not collect information on the extent to which workers arrive by the date employers state that they are needed, a few employers told us that their workers did not arrive on time.” Government Accountability Office, “H-2A Visa Program: Modernization and Improved Guidance Could Reduce Employer Application Burden,” GAO-12–706, September 2012, <https://www.gao.gov/assets/650/648175.pdf>.

<sup>87</sup> 8 C.F.R. § 214.2(h)(13)(i)(A) (2018), <https://www.law.cornell.edu/cfr/text/8/214.2>.



<sup>88</sup> 8 U.S.C. § 1184(g)(1)(B) (2018). International students, by contrast, retain their status or right to hold status continuously over the course of their studies, despite regular school breaks—see 8 C.F.R. § 214.2(f)(5)(i) (2018).

<sup>89</sup> Customs and Border Protection, “CBP Reminds Travelers to Obtain the I-94 Permit Early,” news release, March 11, 2013; and Peter Samore, “Arizona’s Immigration Crisis: How Border Towns Are Impacted,” KTAR News, April 16, 2019, <https://ktar.com/story/2527278/arizonas-immigration-crisis-how-border-towns-are-impacted/>.

<sup>90</sup> 20 C.F.R. § 655.20(f) (2018).

<sup>91</sup> Further Consolidated Appropriations Act of 2020, Pub. L. 116–94, 113 Stat. 2554 § 111 (December 20, 2019), <https://www.congress.gov/116/plaws/publ94/PLAW-116publ94.pdf>; and FY2021 Omnibus and COVID Relief and Response Act, (December 27, 2020), <https://www.congress.gov/bill/116th-congress/house-bill/133/text>.

<sup>92</sup> Wage and Hour Division, “Fact Sheet #78: General Requirements for Employers Participating in the H-2B Program,” Department of Labor, April 2015, <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs78.pdf>.

<sup>93</sup> Office of Advocacy, “Letter Dated 5/17/11—Department of Labor, Employment and Training Administration,” Small Business Administration, May 17, 2011, <https://www.sba.gov/content/letter-dated-51711-department-labor-employment-and-training-administration-1>.

<sup>94</sup> 20 C.F.R. § 655.15(f) (2018); Employment and Training Administration, “Round 9: Staggered Crossing of H-2B Nonimmigrants Working in the Seafood Industry,” Department of Labor, 2015, [https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2B\\_2015\\_IFR\\_FAQs\\_Round9.pdf](https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2B_2015_IFR_FAQs_Round9.pdf); and Outdoor Amusement Business Association, “Ensuring a Viable H-2B Program,” 2013, <https://www.oaba.org/page-18055>.

<sup>95</sup> 20 C.F.R. § 655.122(i) (2018).

<sup>96</sup> 20 C.F.R. § 655.20(y) (2018).

<sup>97</sup> “The proposed regulations state that the Certifying Officer (CO) can terminate the employer’s obligations under the guarantee in the event of fire, weather, or another act of God that makes the fulfillment of the job order impossible. Small businesses have stated that this safety valve will not be very helpful for small H-2B employers. Employers would bear the burden of informing DOL in a timely manner of these events or they could be held liable for payment. Additionally, the only remedy for employers is to terminate the job order.” Office of Advocacy, “Letter Dated 5/17/11—Department of Labor, Employment and Training Administration,” Small Business Administration, May 17, 2011, <https://www.sba.gov/content/letter-dated-51711-department-labor-employment-and-training-administration-1>.

<sup>98</sup> There are two categories of exempt U.S. full-time, year-round employees. 20 C.F.R. § 655.5; and 77 Fed. Reg. 10038, 10046 (February 21, 2012), <https://www.govinfo.gov/content/pkg/FR-2012-02-21/pdf/2012-3058.pdf>. The Department of Labor noted, “Some [employers] stated that they could not afford to provide the same terms and conditions of employment to corresponding workers, including paying the prevailing wage and guaranteeing three-fourths of the hours. For example, a golf course association stated that it would be financially impossible to provide the same wages and benefits to summer high school and college laborers as it provided to H-2B workers performing the same manual labor.”

<sup>99</sup> “An employer will be forced to monitor its employees and ensure they remain within the confines of their job description.” H-2B Workforce Coalition, “RE: RIN 1205-AB58—Temporary Non-Agricultural Employment of H-2B Aliens in the United States,” May 17, 2011, [https://cdn.ymaws.com/www.oan.org/resource/resmgr/imported/pdf/gr/NPRM\\_RIN-1205-AB58\\_H2B\\_Policies.pdf](https://cdn.ymaws.com/www.oan.org/resource/resmgr/imported/pdf/gr/NPRM_RIN-1205-AB58_H2B_Policies.pdf).

<sup>100</sup> The Department of Labor has never issued a housing regulation specific to employers of mobile workers. It has stated that it will interpret its existing regulations to require this—see 80 Fed. Reg. 24042, 24063 (April 29, 2015); and Office of Foreign Labor Certification, “Round 15: Obligations and Job Order Content for Employers of a Mobile Workforce,” Department of Labor, 2015,

[https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2B\\_2015\\_IFR\\_FAQ\\_Job-Order-Content-Mobile-Occupations.pdf](https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2B_2015_IFR_FAQ_Job-Order-Content-Mobile-Occupations.pdf).

<sup>101</sup> 20 C.F.R. § 655.20(j) (2018).

<sup>102</sup> 20 C.F.R. § 655.56(b)–(d) (2018).

<sup>103</sup> Office of Inspector General, “DOL Needs to Improve Debarment Processes to Ensure Foreign Labor Program Violators Are Held Accountable,” Department of Labor report no. 06–20–001–03–321, September 30, 2020, <https://www.oig.dol.gov/public/reports/oa/2020/06–20–001–03–321.pdf>.

<sup>104</sup> 20 C.F.R. § 655.70 (2018); and Government Accountability Office, “H-2B Visas: Additional Steps Needed.”

<sup>105</sup> Employment and Training Administration, “Round 10: Integrity Measures,” Department of Labor, 2015, [https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2B\\_2015\\_IFR\\_FAQs\\_Round10.pdf](https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2B_2015_IFR_FAQs_Round10.pdf).

<sup>106</sup> Government Accountability Office, “H-2B Visas: Additional Steps Needed.”

<sup>107</sup> 29 C.F.R. § 503.15 (2018); in 2020, the Wage and Hour Division had 1,382 employees, slightly more than in 2014, not including H-1B-funded employees—see Wage and Hour Division, “FY 2021 Congressional Budget Justification,” Department of Labor, 2020, <https://www.dol.gov/sites/dolgov/files/general/budget/2021/CBJ-2021-V2-09.pdf>; and Wage and Hour Division, “FY 2014 Congressional Budget Justification,” Department of Labor, 2013, <https://www.dol.gov/sites/dolgov/files/general/budget/2016/CBJ-2016-V2-09.pdf>.

<sup>108</sup> Epstein, Becker, Green, “Wage and Hour Division (WHD) Investigation Checklist,” 2015, <https://www.ebglaw.com/content/uploads/2015/09/Wage-Hour-Division-WHD-Investigation-Checklist-Epstein-Becker-Green.pdf>.

<sup>109</sup> 29 C.F.R. § 503.23 (2018).

<sup>110</sup> 29 C.F.R. § 503.24 (2018); and 29 C.F.R. § 503.20 (2018).

<sup>111</sup> 8 C.F.R. § 214.2(h)(13)(i)(A) (2018); and 8 C.F.R. § 214.2(h)(13)(iv) (2018).

<sup>112</sup> 8 C.F.R. § 214.2(h)(23)(iv) (2018).

<sup>113</sup> 80 Fed. Reg. 24042, 24091 (April 29, 2015), <https://www.govinfo.gov/content/pkg/FR-2015-04-29/pdf/2015-09694.pdf>.

<sup>114</sup> This is slightly more than the number of certified jobs in 2019 (150,465). While this estimate is possible because H-2B workers can have short 10-day gaps between jobs, the DHS estimate is probably higher than the reality given that H-2B jobs often go unfilled as a result of the cap—a phenomenon that DOL fails to track.

<sup>115</sup> Office of Foreign Labor Certification, *Annual Report 2016* (Washington: Department of Labor, 2017), [https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/OFLC\\_Annual\\_Report\\_FY2016.pdf](https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/OFLC_Annual_Report_FY2016.pdf).

<sup>116</sup> Census Bureau, “2017 SUSB Annual Data Tables by Establishment Industry,” March 2020, <https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html>; Government Accountability Office, “H-2B Visas: Additional Steps Needed”; and U.S. Citizenship and Immigration Services, “Approved H-2B Cap-Subject Beneficiaries by Job Code, Fiscal Year 2017,” October 31, 2017, <https://www.uscis.gov/sites/default/files/document/data/approved-h-2b-cap-subject-beneficiaries-by-job-code-fy-2017.pdf>.

<sup>117</sup> This accounts for overtime pay and the length of the job period. Office of Foreign Labor Certification, “Performance Data.”

<sup>118</sup> The survey misses H-2B workers who live in temporary housing. American Community Survey, 1-Year Estimates—Public Use Microdata Sample, 2018, <https://data.census.gov/mdat/#/search?ds=A CSPUMS1Y2018&cv=INDP&rv=OCCP&...>

<sup>119</sup> David J. Bier, “H-2A Visas for Agriculture: The Complex Process for Farmers to Hire Agricultural Guest Workers,” Cato Institute Immigration Research and Policy Brief no. 17, March 10, 2017.

<sup>120</sup> Construction employers may also have trouble proving the needs are temporary, guaranteeing certain employment lengths in advance, paying inflated H-2B wages and immigration fees, limiting workers to a single job category or geographic area, and fulfilling the other demands of the H-2B program. “Sector 23—Construction: May 2019 National Industry-Specific Occupational Employment and Wage Estimates,” Bureau of Labor Statistics, March 31, 2020, <https://www.bls.gov/oes/current/oesrci.htm#23>; Kim Slowey, “Truly No Better Option: H-2B Visas for Construction Workers Spark Industry Controversy,” *Construction Dive*, <https://www.constructiondive.com/news/truly-no-better-option-h-2b-visas-for-construction-workers-spark-industr/421224/>.

<sup>121</sup> “U.S. Immigration Law in the Commonwealth of the Northern Mariana Islands (CNMI),” U.S. Citizenship and Immigration Services, updated June 18, 2020, <https://www.uscis.gov/laws-and-policy/other-resources/us-immigration-law-in-the-commonwealth-of-the-northern-mariana-islands-cnmi>.

<sup>122</sup> Department of Defense Appropriations Act of 2005, Pub. L. 108–287, 118 Stat. 1014 § 14006 (August 5, 2004); and 354 jobs were certified in roe occupations in 2019—see Office of Foreign Labor Certification, “Performance Data.”

<sup>123</sup> Office of Advocacy, “Letter Dated 10/27/10—Department of Labor, Employment and Training Administration,” Small Business Administration, October 27, 2010, <https://www.sba.gov/content/letter-dated-102710-department-labor-employment-and-training-administration-1>.

<sup>124</sup> Government Accountability Office, “H-2B Visas: Additional Steps Needed.”

<sup>125</sup> Adam Startin, “The 5 Hardest Things about Working a Tree Planting Job,” Tentree, October 22, 2017, <https://www.tentree.com/blogs/posts/the-5-hardest-things-about-working-a-tree-planting-job>.

<sup>126</sup> “Forest and Conservation Workers,” Occupational Outlook Handbook, Bureau of Labor Statistics, September 1, 2020, <https://www.bls.gov/ooh/farming-fishing-and-forestry/forest-and-conserv...>

<sup>127</sup> “Labor Force Statistics from the Current Population Survey,” Bureau of Labor Statistics, December 4, 2020, <https://www.bls.gov/web/empsit/cpseea30.htm>.

<sup>128</sup> There were insufficient data for forest and conservation workers. Current Population Survey, Annual Social and Economic (March) Supplement, 2020, [https://data.census.gov/mdat/#/search?ds=CPSASEC2019&vv=\\*A\\_WKSLK\(1:999\)...](https://data.census.gov/mdat/#/search?ds=CPSASEC2019&vv=*A_WKSLK(1:999)...)

<sup>129</sup> In 2020, the unemployment rate did spike without any change in H-2B demand, but that year, U.S. workers were told to remain home, and they received such significant increases unemployment benefits and cash relief from the government that U.S. median incomes rose even with many job losses. Combined with a stay-at-home COVID-19 message from the government, these payments may have undermined any motivation to apply for H-2B jobs that the spike in unemployment would have otherwise created. Nancy Marshall Genzer, “Incomes Rose in April, But Only Because of Government Relief Payments,” Marketplace, May 29, 2020.

<sup>130</sup> Government Accountability Office, “H-2B Visas: Additional Steps Needed.”

<sup>131</sup> Madeline Zavodny, “Immigration and American Jobs,” American Enterprise Institute for Public Policy Research and Partnership for a New American Economy, December 2011, [https://www.newamericaeconomy.org/sites/all/themes/pnae/img/NAE\\_Im-AmerJobs.pdf](https://www.newamericaeconomy.org/sites/all/themes/pnae/img/NAE_Im-AmerJobs.pdf); Madeline Zavodny and Tamar Jacoby, “The Economic Impact of H-2B Workers,” ImmigrationWorks USA and Labor, Immigration and Employee Benefits Division, U.S. Chamber of Commerce, October 28, 2010, [https://www.uschamber.com/sites/default/files/documents/files/16102\\_LABR%2520H2BReport\\_LR.p](https://www.uschamber.com/sites/default/files/documents/files/16102_LABR%2520H2BReport_LR.p) Douglas W. Lipton, “An Economic Analysis of Guest Workers in Maryland’s Blue Crab Industry,” University of Maryland, 2008, <https://www.mdseagrant.org/store/index.php?publication=UM-SG-SGEP-2008-01>; and Thomas J. Murray, “Preliminary Analysis of the Economic Impact of the H-2B Worker Program on Virginia’s Economy,” Virginia Institute of Marine Science Marine Resource report no. 2011-12, September 2011, <http://web.vims.edu/GreyLit/VIMS/mrr11-12.pdf>.

<sup>132</sup> Office of Foreign Labor Certification, “Performance Data.”

<sup>133</sup> More agents working can mean more apprehensions without more total border crossings. Comparing apprehensions to *admissions* is more methodologically sound than comparing apprehensions to H-2 visas or H-2 jobs because the same worker can be admitted multiple times or apprehended multiple times. Immigration and Naturalization Service, *Yearbook of Immigration Statistics* (Washington: Department of Justice, 1992); Department of Homeland Security, *Yearbook of Immigration Statistics* (Washington: Department of Homeland Security, 2019); “CBP: Enforcement Statistics FY 2019: Total CBP Enforcement Actions,” Customs and Border Protection, <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics-fy2019>; Border Patrol, “Nationwide Illegal Alien Apprehensions Fiscal Years 1925–2018,” Customs and Border Protection, Department of Homeland Security; Border Patrol, “Border Patrol Agent Nationwide Staffing by Fiscal Year,” Customs and Border Protection, Department of Homeland Security, March 2019; and “Border Patrol Agents: Southern versus Northern Border,” Transactional Records Access Clearinghouse, Syracuse University, 2006.

<sup>134</sup> Alex Nowrasteh and Andrew C. Forrester, “**H-2 Visas Reduced Mexican Illegal Immigration**,” *Cato at Liberty* (blog), Cato Institute, July 11, 2019.

<sup>135</sup> Kevin Sieff, “Why Is Mexican Migration Slowing While Guatemalan and Honduran Migration Is Surging?,” *Washington Post*, April 29, 2019.

<sup>136</sup> Government Accountability Office, “H-2A and H-2B Visa Programs: Increased Protections Needed for Foreign Workers,” GAO-15-154, March 2015, <https://www.gao.gov/assets/690/684985.pdf>.

<sup>137</sup> David Bier, “**Trump Is Promising Visas for Guatemalans—Here’s How He Can Deliver**,” *Cato at Liberty* (blog), Cato Institute, August 2, 2019.

<sup>138</sup> Department of Homeland Security, “DHS to Improve Integrity of Visa Program for Foreign Workers,” press release, March 5, 2020, <https://www.dhs.gov/news/2020/03/05/dhs-improve-integrity-visa-program-foreign-workers>.

<sup>139</sup> Sources for Text Box 2: Esther Honig, “As Economy Grows, Colorado Companies Rely Increasingly on Foreign Workers,” KUNC, November 16, 2018; Laura Benshoff, “Pa. Landscaping Companies Vie For Some Of Added Summer Work Visas,” WHYY, May 9, 2019; Jeff Barker and Thalia Juarez, “‘I’m Not Here to Take Anyone’s Job’: Mexican Crab Pickers Quietly Work in Maryland as Immigration Debate Rages,” *Washington Post*, October 12, 2019; Tracy Jan, “A Landscaper’s ‘Hire American’ Plan Ended with Bringing in Mexican Workers to Finish the Job,” *Washington Post*, October 6, 2017; Rachel Blount, “Lack of Immigrant Workers Hobbles Horse Racing at Canterbury Park,” *Star Tribune*, June 9, 2017.

<sup>140</sup> Office of Foreign Labor Certification, “Performance Data”; and “Mexico Average Daily Wages,” Trading Economics. The equivalent U.S. dollar amount for 88.36 pesos was \$4.64 in 2019—see Secretaria de Gobernacion de Mexico, “Resolution,” December 2018, [http://web.archive.org/web/20191002091711/https://www.dof.gob.mx/nota\\_detalle.php?codigo=5547224&fecha=26/12/2018](http://web.archive.org/web/20191002091711/https://www.dof.gob.mx/nota_detalle.php?codigo=5547224&fecha=26/12/2018).

<sup>141</sup> Government Accountability Office, “H-2A and H-2B Visa Programs: Increased Protections Needed.”

<sup>142</sup> Department of State, “Residence Abroad Defined,” 9 FAM 401.1-3(F)(2).

<sup>143</sup> NIP Group, “H-2A: Getting Agriculture Workers You Need Legally,” March 24, 2020, [http://web.archive.org/web/20200915132921/https://nipgroup.com/wp-content/uploads/GrowPro\\_H-2A\\_Webinar.pdf](http://web.archive.org/web/20200915132921/https://nipgroup.com/wp-content/uploads/GrowPro_H-2A_Webinar.pdf).

<sup>144</sup> “Reports and Studies—USCIS Program Reports: H-2B,” U.S. Citizenship and Immigration Services, 2020, <https://www.uscis.gov/tools/reports-and-studies>; Enforcement and Removal Operations, “U.S. Immigration and Customs Enforcement Fiscal Year 2019 Enforcement and Removal Operations Report,” Immigration and Customs Enforcement, <https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf>; Alex Nowrasteh, “**Trump Administration Continues to Expand Interior Immigration Enforcement**,” *Cato at Liberty* (blog), Cato Institute, December 14, 2018.

<sup>145</sup> Government Accountability Office, “Overstay Enforcement: Additional Actions Needed to Assess DHS’s Data and Improve Planning for a Biometric Air Exit Program,” GAO-13-683, July 30, 2013, <https://www.gao.gov/assets/660/656316.pdf>.

- <sup>146</sup> Murphy Woodhouse, “Thousands Come to Nogales on Way to Temporary Work,” *Nogales International*, March 20, 2015, [https://web.archive.org/web/20180709165144/https://www.nogalesinternational.com/news/thousar-come-to-nogales-on-way-to-temporary-work/article\\_67d1051c-cf13-11e4-83d1-3f408919c7cd.html](https://web.archive.org/web/20180709165144/https://www.nogalesinternational.com/news/thousar-come-to-nogales-on-way-to-temporary-work/article_67d1051c-cf13-11e4-83d1-3f408919c7cd.html).
- <sup>147</sup> Government Accountability Office, “H-2A and H-2B Visa Programs: Increased Protections Needed.”
- <sup>148</sup> Department of State, “Nonimmigrant Visas Issued by Classification (Including Border Crossing Cards) Fiscal Years 2003–2007,” <https://travel.state.gov/content/dam/visas/Statistics/FY07AnnualReportTableXVIB.pdf>.
- <sup>149</sup> 80 Fed. Reg. 24042, 24091 (April 29, 2015), <https://www.federalregister.gov/documents/2015/04/29/2015-09694/tempora...>
- <sup>150</sup> For instance, Olivia Guzman Garfias described her H-2B job as “slavery” because she couldn’t easily change to another U.S. employer, yet she had returned to it repeatedly from 1997 to 2015. Jessica Garrison, Ken Bensinger, and Jeremy Singer-Vine, “The New American Slavery: Invited to the U.S., Foreign Workers Find a Nightmare,” *Buzzfeed*, July 24, 2015, <https://www.buzzfeednews.com/article/jessicagarrison/the-new-american-slavery-invited-to-the-us-foreign-workers-f>.
- <sup>151</sup> Woodhouse, “Thousands Come to Nogales.” In 2018, a group of H-2A and H-2B workers traveling through Nogales to U.S. jobs told journalists that none of their employers had “mistreated” them and that most intended to keep returning to work as temporary workers.
- <sup>152</sup> Sara Crowe et al., “Human Trafficking on Temporary Work Visas: A Data Analysis 2015–2017,” *Polaris*, June 1, 2018, <https://polarisproject.org/resources/human-trafficking-on-temporary-work-visas-a-data-analysis-2015-2017/>.
- <sup>153</sup> Milli Legrain, “Be Very Careful: The Dangers for Mexicans Working Legally on US Farms,” *The Guardian*, May 16, 2019.
- <sup>154</sup> Government Accountability Office, “H-2B Visas: Additional Steps Needed.”
- <sup>155</sup> Office of Foreign Labor Certification, “2015 H-2B Interim Final Rule FAQs—Round 10: Integrity Measures,” Department of Labor, [https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2B\\_2015\\_IFR\\_FAQs\\_Round10.pdf](https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2B_2015_IFR_FAQs_Round10.pdf); and Office of Foreign Labor Certification, “Program Debarments,” Department of Labor, 2011–2020, <https://www.cato.org/sites/cato.org/files/2020-08/DebarmentListMaster.pdf>.
- <sup>156</sup> 29 C.F.R. § 503.15 (2018).
- <sup>157</sup> H-2B fine amounts were taken by subtracting fines under all other categories from the total fines for employers with H-2B violations. “Wage and Hour Compliance Action Data,” Data Enforcement, Department of Labor, updated October 15, 2020, [https://enforcedata.dol.gov/views/data\\_summary.php](https://enforcedata.dol.gov/views/data_summary.php).
- <sup>158</sup> Office of Foreign Labor Certification, “Program Debarments.”
- <sup>159</sup> It is important to use jobs requested because even employers who fail to receive workers are subject to program rules.
- <sup>160</sup> Wage and Hour Division, “U.S. Department of Labor Investigation Finds Tennessee Landscaping Company Violated H-2B Visa Program Requirements,” March 4, 2020, <https://www.dol.gov/newsroom/releases/whd/whd20200304>; Wage and Hour Division, “U.S. Department of Labor Investigation Results in Maintenance Contractor Paying \$70,000 in Back Wages, Penalties for H-2B Visa Violations,” October 1, 2019, <https://www.dol.gov/newsroom/releases/whd/whd20191001>; Wage and Hour Division, “U.S. Department of Labor Investigation Finds Florida Resort Management Company Unlawfully Employed Non-Immigrant Guest Workers,” May 31, 2019, <https://www.dol.gov/newsroom/releases/whd/whd20190531-0>; and Wage and Hour Division, “Westin Kierland Resort Pays More Than \$76K in Back Wages, Penalties,” March 3, 2015, <https://www.dol.gov/newsroom/releases/whd/whd20150303-0>.



<sup>161</sup> Wage and Hour Division, “Company Unlawfully Employed Non-Immigrant Guest Workers.”

<sup>162</sup> Wage and Hour Division, “U.S. Department of Labor Reaches Settlements with Maine Bakery to Pay \$94,167 in Back Wages and Penalties,” January 29, 2018, <https://www.dol.gov/newsroom/releases/sol/sol20180129>.

<sup>163</sup> 20 C.F.R. § 655.20(y) (2018).

<sup>164</sup> Wage and Hour Division, “U.S. Department of Labor Investigation Results in New Jersey Restaurant Paying \$768,548 for Wage and Visa Program Violations,” February 28, 2019, <https://www.dol.gov/newsroom/releases/whd/whd20190228-0>.

<sup>165</sup> 20 C.F.R. § 655.15(e) (2018).

<sup>166</sup> 20 C.F.R. § 655.15(f) (2018).

<sup>167</sup> Wage and Hour Division, “U.S. Department of Labor Fines Construction Employer for Violating Federal H-2B Visa Program Rules,” July 29, 2019, <https://www.dol.gov/newsroom/releases/whd/whd20190729-0>; Wage and Hour Division, “Michigan Landscaping Company Pays \$97,286 in Back Wages and \$48,241 in Penalties for Violations of H-2B Visa Program,” August 27, 2019, <https://www.dol.gov/newsroom/releases/whd/whd20190827-0>; and Wage and Hour Division, “Maine Vegetable Farm Pays \$10,164 Penalty and Amends Hiring and Pay Practices in U.S. Department of Labor Agreement,” December 22, 2017, <https://www.dol.gov/newsroom/releases/sol/sol20171222>.

<sup>168</sup> 80 Fed. Reg. 24042, 24043 (April 29, 2015), <https://www.govinfo.gov/content/pkg/FR-2015-04-29/pdf/2015-09694.pdf>; and 73 Fed. Reg. 78020, 78037 (December 19, 2008).

<sup>169</sup> 20 C.F.R. § 655.9(a) (2018); and 20 C.F.R. § 655.20(l) (2018).

<sup>170</sup> Government Accountability Office, “H-2A and H-2B Visa Programs: Increased Protections Needed.”

<sup>171</sup> 20 C.F.R. § 655.20(m) (2018); and Wage and Hour Division, “Employee Rights under the H-2B Program,” Department of Labor, <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/H2B-eng.pdf>.

<sup>172</sup> 20 C.F.R. § 655.20(i)(2) (2018).

<sup>173</sup> 20 C.F.R. § 655.20(n) (2018); and 20 C.F.R. § 655.20(j)(2) (2018).

<sup>174</sup> 45 C.F.R. § 1626.7 (2018).

<sup>175</sup> Consolidated Appropriations Act of 2008, Pub. L. 110–161, 121 Stat. 1934 § 540 (December 26, 2007), <https://www.govinfo.gov/content/pkg/PLAW-110publ161/pdf/PLAW-110publ161.pdf>; and Violence against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109–162, 119 Stat. 2978 § 104 (January 5, 2006), <https://www.congress.gov/109/plaws/publ162/PLAW-109publ162.pdf>.

<sup>176</sup> 8 U.S.C. § 1101(a)(15)(t) (2018).

<sup>177</sup> 8 U.S.C. § 1101(a)(15)(u) (2018).

<sup>178</sup> Nothing in the regulations say this directly, but an employer’s petition is the basis of the worker’s status (8 C.F.R. § 214.2(h)(1)(i)) and the petition is revoked if the employee leaves (8 C.F.R. § 214.2(h)(11)(iii)(A)(1)). While a 10-day grace period applies after the petition’s validity period ends (8 C.F.R. § 214.2(h)(13)(i)(A)), this only refers to the initial validity period and doesn’t apply if the petition is revoked. There is also a 30-day grace period but only in the case of a petition revoked on the grounds that the employee paid a fee to obtain the job (8 C.F.R. § 214.2(h)(6)(i)(C)). The Department of Labor’s temporary labor certification process also creates an obstacle because a secondary employer cannot simply hire an H-2B worker immediately. Instead, the employer must have already filed a TLC at least 60 days before the job starts and underwent the full period of H-2B recruitment until 21 days before the job starts. Even though the H2B workers are already in the United States, the law treats them the

same as those entering for the first time from abroad. To protect H-2B workers, the administration should expedite the certification process for those already in the United States.

<sup>179</sup> 8 C.F.R. § 214.2(6)(B) (2018).

<sup>180</sup> U.S. Citizenship and Immigration Services, “Characteristics of H-2B Nonagricultural Temporary Workers,” April 29, 2020.

<sup>181</sup> David J. Bier, “**Problems and Insights within NBC’s Report on H-2A Abuses**,” *Cato at Liberty* (blog), Cato Institute, July 31, 2020.

<sup>182</sup> There are other reasons for not certifying a position besides U.S. worker availability. The DOL may not accept the evidence that the job was temporary or find other deficiencies in the application—so U.S. workers did not necessarily fill jobs that DOL denied, but all certified jobs were left unfilled by U.S. workers at the time of the certification.

<sup>183</sup> “(Seas) Labor Force Participation Rate—16–19 yrs., Men,” BLS Data Viewer, Bureau of Labor Statistics, December 30, 2020, <https://beta.bls.gov/dataViewer/view/timeseries/LNS11300013>. Women also saw a similar decline from 55 percent to 36 percent. “(Seas) Labor Force Participation Rate—16–19 yrs., Women,” BLS Data Viewer, Bureau of Labor Statistics, December 30, 2020, <https://beta.bls.gov/dataViewer/view/timeseries/LNS11300013>.

<sup>184</sup> “CPS Historical Time Series Tables,” Census Bureau, revised March 9, 2020, <https://www.census.gov/data/tables/time-series/demo/educational-attainment/cps-historical-time-series.html>.

<sup>185</sup> Government Accountability Office, “H-2B Visas: Additional Steps Needed.”

<sup>186</sup> Seasonal Employment Alliance Labor, “Are Seasonal Guest-Worker Programs Needed in Today’s COVID Economy?,” September 22, 2020, YouTube video, at 37:24, <https://youtu.be/hohhuzkB5kk?t=2209>.

<sup>187</sup> Office of Foreign Labor Certification, “Performance Data”; “Occupational Employment Statistics,” Bureau of Labor Statistics, last modified July 6, 2020; Department of State, “Nonimmigrant Visa Statistics”; Government Accountability Office, “H-2B Visas: Additional Steps Needed.” Notes: H-2B workers in landscaping were calculated by taking the share of H-2B Department of Labor-certified jobs times the number of visas permitted in that year except from the years where the cap was reached. Because the landscaping industry has received fewer workers through the lottery than their share of jobs, the share of landscaping industry petitions approved for the year available (2018) was used for those years.

<sup>188</sup> Nelson Garcia, “Landscapers Claim Workforce Shortage after President Suspends Work Visas,” 9News, July 7, 2020, <https://www.9news.com/article/news/local/landscapers-claim-workforce-shortage-colorado-suspension-h-2b-visas/73-b98f3def-f79a-4376-a19f-ee98e645199a>.

<sup>189</sup> Government Accountability Office, “H-2B Visas: Additional Steps Needed.”

<sup>190</sup> Chad Arnold, “With New York’s Unemployment on the Decline, the Need for Seasonal Workers Has Increased,” *Democrat and Chronicle* (Rochester, NY), July 2, 2019, <https://www.democratandchronicle.com/story/news/politics/albany/2019/07/02/why-ny-employers-rely-migrant-workers/1286286001/>.

<sup>191</sup> George J. Borjas, “Does Immigration Grease the Wheels of the Labor Market?” *Brookings Papers on Economic Activity* 2001, no. 1 (2001): 69–119, <https://www.oecd.org/unitedstates/24741853.pdf>.

<sup>192</sup> National Academies of Sciences, Engineering, and Medicine, *The Economic and Fiscal Consequences of Immigration* (Washington: National Academies Press, 2017), p. 194, <https://www.nap.edu/read/23550/chapter/8?term=lower+unemployment+rate#1...>

<sup>193</sup> Giovanni Peri and Chad Sparber, “Task Specialization, Immigration, and Wages,” *American Economic Journal: Applied Economics* 1, no. 3 (July 2009): 135–69, <https://www.aeaweb.org/articles?id=10.1257/app.1.3.135>.

<sup>194</sup> Marcus Dillender and Melissa McInerney, “The Role of Mexican Immigration to the United States in Improved Workplace Safety for Natives from 1980 to 2015,” *Journal of Health Economics* 70, issue C (March 2020): 102280, <https://www.sciencedirect.com/science/article/abs/pii/S0167629619303005>.

<sup>195</sup> Bureau of Labor Statistics, “Forest and Conservation Workers: Work Environment,” Occupational Outlook Handbook, last modified September 1, 2020, <https://www.bls.gov/ooh/farming-fishing-and-forestry/forest-and-conserv...>

<sup>196</sup> Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4979 § 205, November 29, 1990, <https://www.govinfo.gov/content/pkg/STATUTE-104/pdf/STATUTE-104-Pg4978.pdf>.

<sup>197</sup> 8 C.F.R. § 214.2(h)(6)(iv)(2)(B) (2018) limits temporary labor certifications to a period of up to one year. 20 C.F.R. § 655.6(a) (2018) allows that a job can be “permanent” so long as the employer’s need is temporary (i.e., a one-time occurrence; a seasonal need; a peakload need; or an intermittent need).

<sup>198</sup> The DOL’s labor certification determines the validity period of USCIS’s petition for nonimmigrant workers under 8 CFR § 214.2(h)(9)(iii)(B), and the petition determines the validity period of the visa under DOS’s regulations (22 CFR § 41.53(c)).

<sup>199</sup> The petition is already valid for the length of the temporary labor certification. 8 C.F.R. § 214.2(h)(9)(iii)(B)(1) (2018); and 8 C.F.R. § 214.2(h)(13)(i)(A) (2018), <https://www.law.cornell.edu/cfr/text/8/214.2>. Only the first admission pursuant to a new petition counts against the cap. U.S. Citizenship and Immigration Services, “Characteristics of H-2B Nonagricultural Temporary Workers,” April 29, 2020, p. ii.

<sup>200</sup> 8 U.S.C. § 1184(g)(1)(B) (2018).

<sup>201</sup> Susan Buchanan, “Seafood Industry Braces for New Guest Worker Rules,” *Louisiana Weekly*, April 16, 2012, <http://www.louisianaweekly.com/seafood-industry-braces-for-new-guest-worker-rules/>.

<sup>202</sup> 8 C.F.R. § 214.2(h)(13)(iv) (2018).

<sup>203</sup> 85 Fed. Reg. 28843 (May 14, 2020), <https://www.federalregister.gov/documents/2020/05/14/2020-10486/temporary-changes-to-requirements-affecting-h-2b-nonimmigrants-due-to-the-covid-19-national>.

<sup>204</sup> 80 Fed. Reg. 10283 (February 25, 2015).

<sup>205</sup> 80 Fed. Reg. 24146, 24159 (April 29, 2015).

<sup>206</sup> Bureau of Labor Statistics, “Usual Weekly Earnings of Wage and Salary Workers,” news release, <https://www.bls.gov/news.release/pdf/wkyeng.pdf>.

<sup>207</sup> In October 2020, the Department of Labor changed how it produces the skill levels for other categories. 85 Fed. Reg. 63872 (October 8, 2020). In January 2021, it further refined the skill levels. 86 Fed. Reg. 3608 (March 15, 2021).

<sup>208</sup> 80 Fed. Reg. 24146, 24156 (April 29, 2015).

<sup>209</sup> The L-1 Visa and H-1B Visa Reform Act of 2004 required four wage levels for all government surveys used for prevailing wages: “Where the Secretary of Labor uses, or makes available to employers, a governmental survey to determine the prevailing wage, such survey shall provide at least 4 levels of wages commensurate with experience, education, and the level of supervision. Where an existing government survey has only 2 levels, 2 intermediate levels may be created by dividing by 3, the difference between the 2 levels offered, adding the quotient thus obtained to the first level and subtracting that quotient from the second level.” 8 U.S.C. § 1182(p)(4) (2016); H-1B Visa Reform Act of 2004, Pub. L. 108-447, 118 Stat. 3353 § 423 (December 8, 2004), <https://www.congress.gov/108/plaws/publ447/PLAW-108publ447.pdf>. The Department of Labor implemented this law for the H-2B program because the H-2B program’s prevailing wage process had always followed the same procedures as the process for the H-1B and permanent visa programs. Bier, “Murky Origins of the H-2B Program’s Prevailing Wage Rule.” In August 2010, a district court overturned the H-2B prevailing wage rule because it failed to accept comments on the issue and erroneously stated in a footnote that the

2004 law only applied to the H-1B program. The court ultimately did not opine further on the issue because this was a position supported by both the plaintiffs and Department of Labor. *CATA v. Solis*, Civil No. 2:09-cv-240-LP, 2010 WL 3431761 (E.D. Pa.),

[https://www.govinfo.gov/content/pkg/USCOURTS-paed-2\\_09-cv-00240/pdf/USCOURTS-paed-2\\_09-cv-00240-0.pdf](https://www.govinfo.gov/content/pkg/USCOURTS-paed-2_09-cv-00240/pdf/USCOURTS-paed-2_09-cv-00240-0.pdf). In 2011, the Department of Labor finalized a regulation to eliminate the four-tiered wage structure because it did not accurately measure the prevailing wage. 76 Fed. Reg. 3452, 3458 (January 19, 2011), <https://www.govinfo.gov/content/pkg/FR-2011-01-19/pdf/2011-1117.pdf>. Congress blocked implementation of the regulation. Consolidated and Further Continuing Appropriations Act of 2012, Pub. L. 112-55, 125 Stat. 640 § 546 (November 18, 2011), <https://www.congress.gov/112/plaws/publ55/PLAW-112publ55.pdf>. In 2013, the same district again ruled that the four-tiered rule violated the Administrative Procedure Act because it was enacted contrary to the Department of Labor's stated conclusions about its validity in measuring skills. The decision did not mention the 2004 law. *CATA v. Solis*, 2013 WL 1163426, (E.D. Pa. 2013), <https://casetext.com/case/comite-de-apoyo-a-los-trabajadores-agricolas-v-solis-4>. In 2013, the Department of Labor finalized another wage rule, again eliminating the use of four tiers. 78 Fed. Reg. 24047 (April 24, 2013), <https://www.govinfo.gov/content/pkg/FR-2013-04-24/pdf/2013-09723.pdf>. In February 2014, the Third Circuit found that it was "unambiguous" that the L-1 Visa and H-1B Visa Reform Act of 2004 language on wage levels did not apply to the H-2B program because the section's short title was "H-1B Prevailing Wage Level." The decision stated: as its title would suggest, the L-1 Visa and H-1B Visa Reform Act amended only provisions of U.S. immigration statutes dealing with the L-1 and H-1B visa programs. *Louisiana Forestry Association Inc. v. Secretary United States Department of Labor*, 745 F.3d 653 (3d Cir. 2014), <https://casetext.com/case/la-forestry-assn-inc-v-secretary-us-dept-of-labor>. This conclusion is incorrect because the same section that imposes wage levels on prevailing wage surveys explicitly amends the E and permanent visa prevailing wage process. While the law does not explicitly mention H-2B, the language broadly includes any prevailing wage determination, and Congress would have known at the time that the H-2B program was governed by the same process as the H-1B and permanent prevailing wage programs.

<sup>210</sup> Joseph G. Altonji and Robert A. Shakotko, "Do Wages Rise with Job Seniority?," *Review of Economic Studies* 54, no. 3 (July 1987): 437-59, <https://academic.oup.com/restud/article-abstract/54/3/437/1558385?redirectedFrom=fulltext>; Joseph G. Altonji and Nicolas Williams, "Do Wages Rise with Job Seniority? A Reassessment," *ILR Review* 58, no. 3: 370-97 (April 1, 2005), <https://journals.sagepub.com/doi/10.1177/001979390505800304>; and Nicolas Williams, "Seniority, Experience, and Wages in the UK," *Labour Economics* 16, no. 3 (June 2009): 272-83, <https://www.sciencedirect.com/science/article/abs/pii/S0927537108001048>.

<sup>211</sup> Wage and Hour Division, "Fact Sheet #78."

<sup>212</sup> 20 C.F.R. § 655.731(a)(2)(ii)(A) (2018).

<sup>213</sup> Employers must also attest to USCIS that they did not receive any fees that H-2 workers paid to get the job in prior years (or documenting that it has repaid any such fees), 8 C.F.R § 214.2(h)(6)(i)(B) (2019). USCIS should also allow DOL to enforce this requirement at the labor certification stage for unnamed petitions because its regulations also contain the same prohibition on job placement fees, 20 CFR § 655.20(o) (2019).

<sup>214</sup> After approval, the employer could pay the \$150 H-2B fraud fee required by 8 USC § 1184(c)(13). Failure to pay the fee by the job start date would be grounds for revocation of the petition.

<sup>215</sup> 73 Fed. Reg. 77110 (December 18, 2008), <https://www.govinfo.gov/content/pkg/FR-2008-12-18/pdf/E8-29309.pdf>.

<sup>216</sup> 73 Fed. Reg. 78020, 78023 (December 19, 2008).

<sup>217</sup> David J. Bier, "**The Obama Admin Claimed More Bureaucracy Would Stop H-2B Violations—It Was Wrong**," *Cato at Liberty* (blog), Cato Institute, August 13, 2020.



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