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CLOSE TO CRUCIAL: THE H-2B VISA PROGRAM MUST EVOLVE, BUT MUST ENDURE

In June 2007, comprehensive immigration reform efforts failed in the Senate, deflating hopes for what President Bush called “an historic opportunity for Congress to act . . . to replace a system that is not working.”¹ Despite months of debate and negotiations that garnered the national spotlight, reform supporters in Congress could not assemble a unified panacea.² Even Senator Edward Kennedy (D-MA), who led Senate reform efforts, admitted the legislation put forth was not a “perfect bill,”³ and other senators indicated they were willing to support it only because they believed the House of Representatives could improve it.⁴ Ultimately, key provisions of the bill so sharply divided legislators that no immigration measure received a final vote, and the “toxic” topic of U.S. immigration policies likely will remain untouched for the duration of the 110th Congress and President Bush’s administration.⁵

Meanwhile, during Congress’s ongoing debate, on Maryland’s Eastern Shore, the seafood industry harvested blue crabs, as it has for generations. Annually, from about April to Thanksgiving, the season’s bounty is brought ashore, and crab processing businesses—many of them small and family-owned—are responsible for picking the meat and supplying restaurants and markets with Maryland’s iconic delicacy.⁶ The picking process requires long and arduous hours of labor, however, and in recent years, crab proces-

1. President Bush Discusses Comprehensive Immigration Reform, 2007 U.S. C.C.A.N. D383 (June 26, 2007).

2. See Robert Pear & Carl Hulse, *Immigration Bill Dies in Senate; Defeat for Bush*, N.Y. TIMES, June 29, 2007, at A1.

3. Press Release, Senator Edward Kennedy, Kennedy on Comprehensive Immigration Reform (May 21, 2007), available at http://kenedy.senate.gov/newsroom/press_releases.cfm (follow “Comprehensive Immigration Reform” hyperlink).

4. Pear & Hulse, *supra* note 2.

5. See Tom Abate, *Business Lobbies for More Labor*, S.F. CHRON., Dec. 5, 2007, at C1.

6. See Rona Kobell & Chris Guy, *End of Seasonal Visas Threatens Crab Processors*, BALT. SUN, Sept. 29, 2007, at 1A.

sors have struggled to employ a local workforce.⁷ As a result, some in the industry have been forced out of business, but others have found a lifeline—foreign laborers.⁸ In particular, businesses like J.M. Clayton Seafood, the Eastern Shore's oldest picking house, depend for survival on bringing in workers through the H-2B visa program, which permits foreign laborers to round out a business's workforce on a seasonal basis.⁹

Some small and seasonal businesses like J.M. Clayton Seafood have been able to thrive because they are getting help through the H-2B visa program. Yet the program and the businesses that depend on its existence are in danger because Congress has failed to address immigration reform, and is not expected to do so until at least 2009. Specifically, because no legislation that would amend current immigration programs received a vote in Congress in 2007, an H-2B program modification that Congress has approved in years past still hangs in the balance. Senator Barbara Mikulski (D-MD), whose constituents include Eastern Shore seafood businesses, has sponsored a bill that would permit a limited—but critical—number of additional H-2B workers to enter the United States to aid imperiled small and seasonal businesses.¹⁰ Although Congress approved this same provision for fiscal years ("FY") 2005, 2006, and 2007, the current immigration stalemate has stymied its passage for FY 2008.¹¹

Further, several vocal critics—notably, the Southern Poverty Law Center, in a report entitled "Close to Slavery"—have attacked the core of the current H-2B program and have focused on shortcomings in labor protections and worker mobility, along with infringement on American workers.¹² Although it is possible that comprehensive immigration reform can indeed address and alle-

7. See Tyeesha Dixon & Jamie Smith Hopkins, *Commerce Chief Firm on Visa Cap*, BALT. SUN, Oct. 6, 2007, at 10C. On his inability to find local workers, one owner of a business that harvests and sells crabmeat commented, "If [the H-2B] program goes away, it will devastate the crab industry in the Chesapeake Bay The work force to process the meat is not there, and it never will be there in this country again." Rona Kobell, *Shore Faces Shortage of Labor*, BALT. SUN, Jan. 14, 2008, at 1B.

8. See Kobell & Guy, *supra* note 6.

9. *Id.*

10. See Dixon & Hopkins, *supra* note 7.

11. See Kobell, *supra* note 7.

12. See generally MARY BAUER, S. POVERTY LAW CTR., CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES 2 (2007), <http://www.splcenter.org/pdf/static/SPLCguestworker.pdf> [hereinafter CLOSE TO SLAVERY].

viate the inadequacies highlighted by critics, the H-2B program remains largely viable in its current form, absent successful Congressional endeavors in this arena. Certainly the existing H-2B program has weaknesses, but Congress can attend to its flaws without altering the foundation of the program—the underpinnings on which small and seasonal businesses rest their hopes for survival.

Section I of this comment explores the history and development of the H-2B visa program through Congress and the U.S. Department of Labor (“DOL”), as well as Senator Mikulski’s proposed addendum to the program. Section II addresses criticism that the H-2B program inadequately protects workers’ labor rights and highlights judicial precedent that suggests Congress should provide H-2B workers with an express grant of protection and access to ample government enforcement. Section III assesses opponents’ claims that H-2B program regulations requiring workers to remain with one employer for the duration of their visas leave workers vulnerable to abuses. Despite such claims, however, widespread media reports indicate that many workers thrive under the program; notably, Senator Mikulski’s statutory numerical cap exemption provision for returning workers fosters enduring and beneficial relationships between employers and workers and protects against potential abuse. Section IV argues that in contrast to critics’ complaints that H-2B workers harm American workers, the H-2B program has in place effective self-regulating standards that prevent injury to American workers, and that furthermore, H-2B workers do not take Americans’ jobs. In fact, as long as their numbers are not arbitrarily restricted, H-2B workers actually benefit American workers by preventing employers from turning to illegal, undocumented workers. Finally, Section V concludes by summarizing the need for the H-2B program’s continued existence, despite its shortcomings.

I. LEGISLATIVE AND REGULATORY HISTORY OF THE H-2B VISA PROGRAM

A. *Development of the H-2B Visa*

1. 1952–2005

The H-2B visa allows foreign workers into the United States to work for an employer on a temporary basis in seasonal, non-agricultural industries.¹³ The H-2B visa was originally part of the H-2 program that governed all temporary foreign workers, which the Immigration and Nationality Act (“INA”) of 1952 created.¹⁴

The Immigration Reform and Control Act (“IRCA”) of 1986 created separate programs for temporary laborers—an H-2A program for agricultural workers and an H-2B program for non-agricultural workers¹⁵—in response to advocacy to enhance protections for agricultural workers.¹⁶ Following the enactment of IRCA, DOL’s Employment and Training Administration promulgated extensive regulations for the protection of H-2A workers.¹⁷ The regulations prohibited discrimination and waiver of rights and established procedures for enforcement,¹⁸ but those regulations, to date, have never been applied expressly to H-2B workers.¹⁹

In 1990, Congress amended the INA to stipulate that beginning in FY 1992, no more than 66,000 H-2B visas could be issued annually.²⁰ In FY 1992, the U.S. Department of State, remaining

13. 8 U.S.C. § 1101(a)(15)(H)(ii)(b) (2000).

14. Pub. L. No. 82-414, § 101(a)(15)(H), 66 Stat. 163, 168 (1952).

15. Pub. L. No. 99-603, § 301(a), 100 Stat. 3359, 3411 (1986) (current version at 8 U.S.C. § 1101(a)(15)(H)(ii) (2000)); H.R. REP. NO. 99-682, at 50–51, 80 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5649, 5654–55, 5684.

16. Arthur N. Read, *Learning from the Past: Designing Effective Worker Protections for Comprehensive Immigration Reform*, 16 TEMP. POL. & CIV. RTS. L. REV. 423, 430 (2007).

17. *See* 29 C.F.R. pt. 501 (2006).

18. *Id.*

19. Read, *supra* note 16, at 433-35; *see* Martinez v. Reich, 934 F. Supp. 232, 237 (S.D. Tex. 1996) (discussing how Congress made changes to H-2A programs, but not H-2B programs).

20. Immigration Act of 1990, Pub. L. 101-649, § 205(a), 104 Stat. 4978, 5019 (current version at 8 U.S.C. § 1184(g)(1)(B) (2000)).

well beneath the statutory cap, issued 12,552 H-2B visas.²¹ Since FY 1993, however, the number of H-2B visas issued has climbed steadily.²² In FY 2003, for example, U.S. Citizenship and Immigration Services (“USCIS”) issued 78,955 H-2B visas, and the agency acknowledged it had exceeded the statutory limitation.²³ In FY 2004, the agency issued 76,169 H-2B visas by March, and at that time it announced it would issue no additional visas for the remainder of the fiscal year.²⁴ In FY 2005, H-2B applicants again prematurely exhausted the cap, but this time by January 4, 2005.²⁵

2. 2005–Present

Because rules governing H-2B applications require that employers apply for the visas no earlier than four months prior to needing foreign labor,²⁶ the cap’s exhaustion in 2005—just three months into the fiscal year—eliminated some employers from eligibility for any H-2B visas for that year.²⁷ As various industries have come to rely upon H-2B workers to keep their businesses afloat—among them Maryland crab processors—employers locked out of participating in the FY 2005 H-2B program sought congressional relief.²⁸ In response, Senator Mikulski introduced the Save Our Small and Seasonal Businesses Act of 2005 that would exempt H-2B workers who were returning for an additional temporary stint with the same business from counting against the cap and divide allotment of the 66,000 total H-2B visas into 33,000 for the first half of the fiscal year and 33,000 for the second half.²⁹

21. See ANDORRA BRUNO, CONG. RESEARCH SERV., IMMIGRATION: POLICY CONSIDERATIONS RELATED TO GUEST WORKER PROGRAMS 6 (2007).

22. See *id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. See OFFICE OF FOREIGN LABOR CERTIFICATION EMPLOYMENT & TRAINING ADMIN., U.S. DEPT’ OF LABOR, TRAINING & EMPLOYMENT GUIDANCE LETTER NO. 21-06, PROCEDURES FOR H-2B TEMPORARY LABOR CERTIFICATION IN NON-AGRICULTURAL OCCUPATIONS 1, 6 (2007), available at <http://wdr.doleta.gov/directives/attach/TEGL/TEGL21-06.pdf> [hereinafter TRAINING & EMPLOYMENT GUIDANCE LETTER].

27. See Kobell & Guy, *supra* note 6.

28. See *id.*

29. Save Our Small and Seasonal Business Act of 2005, S. 352, 109th Cong. (2005).

Congress enacted the language of Senator Mikulski's legislation for FY 2005 by inserting it into the REAL ID Act of 2005, provided the exemption allotment schedule would sunset after two years.³⁰ Congress renewed the language for FY 2007, again incorporating it into an unrelated bill, this time with a provision for a one-year lifetime.³¹ Owing to the exemption of returning workers from the statutory cap, USCIS issued an estimated 89,135 H-2B visas in FY 2005, and 122,541 in FY 2006.³² The U.S. Department of State calculated that "50,854 of the FY 2006 H-2B visas were issued to cap-exempt returning H-2B workers."³³

In 2007, amidst impassioned efforts by both the Bush Administration and Congress to achieve comprehensive immigration reform, Senator Mikulski introduced the same provision which provided that the exemption from the statutory cap for returning H-2B workers should extend through FY 2012.³⁴ Because negotiations for any immigration overhaul failed in June, however, no immigration bills, including Senator Mikulski's, received a vote.³⁵

Following Congress's failure to implement any legislation rescuing businesses from the limited availability of H-2B visas, the one-year exemption provision for returning workers expired on October 1, 2007.³⁶ Without an exemption available for any previous H-2B workers, USCIS announced on October 1 that it had fulfilled all 33,000 available slots for October 2007 through April 2008.³⁷

Yet on October 16, 2007, Senator Mikulski once again attempted to place renewal language (with a one-year expiration date) into unrelated appropriations legislation, which the Senate passed.³⁸ In conference with the House, however, conferees stripped the provision from the bill, refusing to incorporate any

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

31. See Pub. L. 109-364, § 1074, 120 Stat. 2083, 2403 (2006).

32. BRUNO, *supra* note 21, at 6.

33. *Id.*

34. See Save Our Small and Seasonal Businesses Act of 2007, S. 988, 110th Cong. (2007).

35. See Kobell & Guy, *supra* note 6.

36. See Save Our Small and Seasonal Business Act of 2005, S. 352, 109th Cong. (2005).

37. Press Release, U.S. Citizenship & Immigration Servs., USCIS Reaches H-2B Cap for First Half of FY2008 (Oct. 1, 2007), available at http://www.uscis.gov/files/pressrelease/H2B_1oct07.pdf.

38. See H.R. 3093, 110th Cong. (2007).

efforts to alter immigration policy short of comprehensive reform.³⁹ Thus, to date, Congress has not passed any provision exempting returning workers, and USCIS announced on January 3, 2008, that all H-2B visa slots available for April through October 2008 have been filled.⁴⁰

B. *U.S. Department of Labor Requirements Under the H-2B Program*

To obtain workers through the H-2B program, prior to filing a petition with USCIS for final approval, prospective employers must apply for labor certification through DOL.⁴¹ According to regulations, “[t]he labor certification shall be advice . . . on whether or not United States workers capable of performing the temporary services or labor are available and whether or not the alien’s employment will adversely affect the wages and working conditions of similarly employed United States workers.”⁴²

Federal regulations stipulate no additional specific conditions related to DOL approval, and thus DOL has developed procedures employers must follow. In a Training and Employment Guidance Letter, DOL set forth measures for applications for H-2B workers.⁴³ Employers must apply to DOL no more than four months in advance of the time when they need workers for a determination that no competent U.S. workers are available to take the positions.⁴⁴ Employers must prove to DOL that they need the posi-

39. See Kobell, *supra* note 7. In refusing to accept any proposal outside of broad reform, Representative Joe Baca (D-CA) stated, “The discussion over extending H-2B visas is inherently linked to our nation’s greater immigration debate, and it must be resolved within that context.” *Id.*

40. Press Release, U.S. Citizenship & Immigration Servs., USCIS Reaches H-2B Cap for Second Half of Fiscal Year 2008 (Jan. 3, 2008), available at http://www.uscis.gov/files/pressrelease/H-2B_3jan08.pdf.

41. 8 C.F.R. § 214.2(h)(6)(iii)(A) (2007).

42. *Id.*

43. See generally TRAINING & EMPLOYMENT GUIDANCE LETTER, *supra* note 26.

44. See *id.* at 6. For determining whether U.S. workers are available to take the positions, the agency considers “U.S. workers living or working in the area of intended employment, and may also consider U.S. workers who are willing to move from elsewhere to take the job” *Id.* at 8. It also looks at whether U.S. workers can perform the duties involved in the occupation “as customarily performed by other U.S. workers similarly employed and [are] willing to accept the specific job opportunity” on the dates the employer requires. *Id.* Employers must also demonstrate employment of an H-2B worker will not “adversely affect the wages and working conditions of similarly employed U.S. workers.” *Id.* at 9. Factors to be considered include “local or regional labor market information, special circumstances of the industry, organization, and/or occupation, the prevailing wage

tions, and that they have advertised the positions and have received an inadequate response.⁴⁵ Prospective H-2B employers must place their job listing into their state agency's job bank system for ten days and advertise the job opportunity in a newspaper of general circulation for three consecutive calendar days or in a readily available professional, trade, or ethnic publication, whichever the state agency determines "is most appropriate for the occupation and most likely to bring responses from U.S. workers."⁴⁶

Once DOL renders a decision on an employer's application, the process continues to USCIS.⁴⁷ Along with its labor certification, an employer must demonstrate in detail to USCIS the situation that makes it necessary to bring H-2B workers to the United States.⁴⁸ Once the statutory cap has been reached for H-2B visas, USCIS cannot issue additional visas.⁴⁹ The employers' applications that USCIS approves are then processed by the U.S. Department of State in the home country of the workers.⁵⁰

II. THE H-2B PROGRAM'S CRITICS: INADEQUATE PROTECTIONS FOR WORKERS AND ENFORCEMENT OF WORKERS' RIGHTS

A. *Allegations of Nearly Non-Existent Labor Protections for H-2B Workers*

A chief criticism of the H-2B program is that it fails to provide adequate and fair worker protections for laborers, leaving workers vulnerable to abuse and allowing employers' wrongs to go unpunished. In a March 2007 report entitled "Close to Slavery," the Southern Poverty Law Center ("SPLC") claimed widespread wage and hour violations, breaches of contract, denial of medical

rate for the occupation in the area of intended employment, and prevailing working conditions," along with other conditions that would preclude effective recruitment of U.S. workers. *Id.*

45. *Id.* at 7-8.

46. *Id.* at 7.

47. See 8 C.F.R. § 214.2(h)(6)(iii)(E) (2007).

48. *Id.* at § 214.2(h)(6)(iv).

49. See U.S. Citizenship and Immigration Services, Current Cap Count for Non-Immigrant Worker Visas for Fiscal Year 2008, <http://www.uscis.gov> (follow "For Employers" hyperlink; then follow "Current Cap Count for Non-Immigrant Worker Visas for Fiscal Year 2008" hyperlink) (last visited Feb. 25, 2008).

50. See *id.*

treatment, and other abuses against workers.⁵¹ Worse, SPLC reported, despite their infractions, employers rarely receive punishment.⁵² Like SPLC, the AFL-CIO has criticized the H-2B program, claiming “[t]he current system leaves unpunished unscrupulous employers who exploit undocumented workers.”⁵³ SPLC has reported that employers suffer no consequences for labor violations because DOL has asserted that pursuant to H-2B program regulations, it has no authority to respond.⁵⁴

1. Extending the H-2A Program’s Protections to H-2B Workers

Critics have alleged H-2B workers are more prone to abuse because, unlike existing regulations for the H-2A program, the H-2B regulations offer no express labor protections.⁵⁵ Despite originating from one legislative act meant to regulate all temporary foreign laborers, regulations governing the H-2A program have developed in far greater detail than those governing the administration of its counterpart. For example, H-2A employers must pay workers the highest of the federal or applicable state minimum wage, the prevailing wage rate, or the adverse effect wage rate (“AEWR”).⁵⁶

In contrast, under the H-2B program, when filing for certification through DOL, employers simply must state “the nature, wage and working conditions of the job and assure DOL that the wage and other terms meet prevailing conditions in the industry.”⁵⁷ Theoretically, H-2B workers should collect in wages what similarly employed U.S. workers receive. Unlike an AEWR option, however, the prevailing wage rate guarantees no concretely enforceable rate for workers. Further, as will be discussed in subsection 2, if employers fail to pay the rate they promised, workers

51. CLOSE TO SLAVERY, *supra* note 12, at 2.

52. *See id.* at 29.

53. AFL-CIO, WHAT UNION MEMBERS SHOULD KNOW ABOUT . . . : THE AFL-CIO POLICY ON IMMIGRATION 1 (2007), available at <http://afl-cio.org/issues/civilrights/immigration/upload/AFLCIOPO.pdf>.

54. *See* CLOSE TO SLAVERY, *supra* note 12, at 29.

55. *See id.* at 8.

56. 20 C.F.R. § 655.102(b)(9)(i) (2007). There are criticisms of the AEWR because of its difficult calculation and unenforceable nature. *See* CLOSE TO SLAVERY, *supra* note 12, at 21.

57. CLOSE TO SLAVERY, *supra* note 12, at 8.

have no redress.⁵⁸ Lending credence to SPLC's claims that H-2B requirements covering wage rates are not providing effective protection for workers, an AFL-CIO representative told the *Houston Chronicle* it has found compensation paid to H-2B workers in Texas is well below that earned by local American workers in the same fields.⁵⁹

Furthermore, H-2A employers "must provide workers with housing, transportation, and other benefits, including workers' compensation insurance," but H-2B program requirements offer no such protections.⁶⁰ In addition, DOL regulations guarantee that H-2A workers will work or be compensated for seventy-five percent of the hours stipulated in their contracts; H-2B workers have no such guarantee.⁶¹

SPLC has concluded that the dearth of explicit labor regulations for the H-2B program means workers often suffer at the hands of unscrupulous employers.⁶² For instance, SPLC highlighted the story of one H-2B worker who worked as a tree planter and cut his knee badly on the job.⁶³ He told SPLC he was sick for a month, but did not receive any help from the company, and he had to pay for medicine out of his own pocket, along with his continuing living costs.⁶⁴ Other laborers reported to SPLC that employers misclassified their jobs or misrepresented their hours, enabling employers to cheat laborers out of wages.⁶⁵

2. The Absence of Government Authority and Enforcement of Labor Protections Threatens H-2B Workers

One author has claimed that although the lack of regulations governing H-2B workers presents a critical problem, "[t]he most fundamental problem for H-2B workers . . . is that the DOL has no mechanism for investigating and responding to employer vio-

58. *See id.* at 8, 21.

59. L.M. Sixel, *A Leader in Visa Requests*, HOUSTON CHRON., Oct. 6, 2007, at 1.

60. BRUNO, *supra* note 21, at 2-4.

61. *See* CLOSE TO SLAVERY, *supra* note 12, at 22.

62. *See id.* at 23, 25 (highlighting impairments to workers when they do not receive hours they were promised or medical treatment they need).

63. *Id.* at 27.

64. *Id.*

65. *Id.* at 23-24.

lations of the rights of such workers.”⁶⁶ Thus, employers may violate contractual provisions or refuse to pay wages for actual hours worked by the H-2B workers, and “DOL regulations and federal law provide no remedy when these rights have been violated.”⁶⁷ SPLC has gone a step further to conclude that the H-2B program’s core flaw lies in its lack of explicit regulations—the absence of guidelines has actually enabled DOL to disclaim any authority to regulate and enforce worker protections.⁶⁸ SPLC reported that “DOL, in fact, asserts that it has no authority to enforce the provisions of an H-2B contract under most circumstances.”⁶⁹

SPLC’s report also suggests that even if regulations did provide additional rights for H-2B workers, obtaining DOL enforcement would still be problematic.⁷⁰ Implying that DOL does not stand behind its authority, SPLC reported that despite express protections governing H-2A workers, DOL initiated investigations into just eighty-nine H-2A employers in 2004, out of about 6700 employers certified in the United States to employ H-2A workers.⁷¹ Furthermore, SPLC reported that

when employers do violate the legal rights of workers, the DOL takes no action to stop them from importing more workers. The Government Accountability Office reported in 1997 that the DOL had never failed to approve an application to import H-2A workers because an employer had violated the legal rights of workers.⁷²

Perhaps most significantly, SPLC noted that “[c]onspicuously absent from proposals to expand guestworker programs . . . is any discussion about a substantial increase in the federal budget for the DOL . . . to ensure that guestworkers are protected on their jobs.”⁷³

66. Read, *supra* note 16, at 434.

67. *Id.* at 434–35.

68. See CLOSE TO SLAVERY, *supra* note 12, at 22.

69. *Id.*

70. See *id.* at 29–30.

71. *Id.* at 29.

72. *Id.*

73. *Id.* at 28.

B. *H-2B Workers Deserve Express Protections and Reliable Government Enforcement*

Although H-2B workers' rights to protections under U.S. labor laws have commanded attention from the courts and employers, workers merit an explicit grant of government protection and subsequent implementation.

1. Courts Are Beginning to Suggest Expansion of H-2B Laborers' Rights

Castellanos-Contreras v. Decatur Hotels, L.L.C. recognized H-2B workers' rights under the Fair Labor Standards Act ("FLSA") and inferred that additional rights enumerated for H-2A workers apply equally to H-2B workers.⁷⁴ The *Castellanos-Contreras* court, noting that this was an issue of first impression in the federal courts, held that the protections of FLSA apply to H-2B workers in the United States.⁷⁵ In reaching its result, the court analyzed Congress's original creation of a single temporary worker program and the subsequent modifications that divided the H-2A and H-2B programs between agricultural workers and non-agricultural workers.⁷⁶ Noting that *Arriaga v. Florida Pacific Farms, L.L.C.*⁷⁷ and its progeny have specifically applied the protections of the FLSA to the H-2A program,⁷⁸ the court stated that "[w]hile the historical development and fragmentation of the H-2 program clearly demonstrates Congress's special concern for agricultural laborers, it does not suggest that nonagricultural laborers are to be divested of any legal rights they may otherwise enjoy."⁷⁹

In addition to *Castellanos-Contreras*, additional lawsuits have arisen from H-2B workers' claims under FLSA and have often ended in settlements where employers pay back wages to workers. For instance, in a case where twelve Guatemalan H-2B workers claimed they worked up to eighty hours a week, lived in deplorable conditions, were denied medical treatment, and earned

74. 488 F. Supp. 2d 565, 571-72 (E.D. La. 2007).

75. *Id.* at 566, 572.

76. *Id.* at 569-71.

77. 305 F.3d 1228 (11th Cir. 2002).

78. *Castellanos-Contreras*, 488 F. Supp. 2d at 569.

79. *Id.* at 571.

far below the \$7.50 hourly rate they were promised, they settled out of court with their former landscaping employer.⁸⁰ The employer agreed to pay \$40,000 in back wages and interest, along with a \$3900 civil penalty.⁸¹ Similarly, SPLC has reported settlements of alleged wage and hour violations, including one instance in which an employer paid \$103,000 in back wages to fifty-one workers for failing to pay minimum wage and overtime wages.⁸² Employers' decisions to settle suggest that despite the lack of applicable federal regulations or relevant case law, employers understand and admit they are bound by FLSA with regard to H-2B workers.

As cases continue to emerge, other courts presented with questions of workers' rights under the FLSA should follow in the steps of the *Castellanos-Contreras* court. Although out of court settlements usually do not require one party to admit liability, large payouts by employers in such situations strongly indicate that employers are heeding warnings that federal law—in practice, if not explicitly—requires that they pay lawful wages and provide other FLSA guarantees to their workers.

At the time DOL developed protections for H-2A workers, concerns regarding safety and vulnerability of agricultural workers had captured the spotlight.⁸³ As the *Castellanos-Contreras* court noted, however, fragmentation of the two programs was never intended to deprive H-2B workers of rights to which they are entitled.⁸⁴ In addition, at the time DOL augmented the H-2A program regulations, it was acting in response to a heavy lobby from various interests within the growing agricultural industry.⁸⁵ Likewise, now, as the H-2B program has reached new industries and expanded ten-fold—from 12,552 visas issued in FY 1992 to 122,541 issued in FY 2006—the program deserves congressional

80. Mark Spencer, *Settlement Ends Workers' Suit*, HARTFORD COURANT, June 26, 2007, at B1.

81. Janice Podsada, *Granby Firm Pays Migrants' Wages*, HARTFORD COURANT, Aug. 2, 2007, at E2.

82. CLOSE TO SLAVERY, *supra* note 12, at 20.

83. See *Castellanos-Contreras*, 488 F. Supp. 2d at 570–71.

84. *Id.* at 571.

85. See *id.* at 570–71 (discussing multiple congressional responses to concerns of agriculture workers, associations, and employers).

consideration and action to place it on equal footing with its H-2A counterpart.⁸⁶

2. H-2B Program Regulations Warrant Verbatim Application of Protections Already in Place for H-2A Workers

Although the *Castellanos-Contreras* ruling and additional reports of settlement agreements between H-2B workers and employers suggest an increased acknowledgment of H-2B laborers' protections, workers deserve validation beyond judicial precedent. Furthermore, although courts may establish that workers are legally entitled to protection, without a congressional mandate to DOL and promulgation of express regulations, H-2B workers have little hope for valuable and effective investigation and enforcement.

As discussed above, the *Castellanos-Contreras* court recognized that Congress's decision to split apart the temporary foreign laborer programs should not divest H-2B workers of any rights to which they are entitled.⁸⁷ The court went even further, however, and suggested H-2B workers may also merit protection under regulations that specifically govern H-2A workers, including rights to monetary relief under FLSA for visa, travel, and recruitment costs.⁸⁸ Following this court's lead and analysis, Congress should intervene and require that DOL provide H-2B workers explicit application of identical rights.

Second, whereas DOL has contended it possesses no authority to enforce contracts for H-2B workers, specific regulations created expressly for the H-2B program will allow DOL to investigate and enforce workers' protections as it already does for the H-2A program.⁸⁹ For instance, where DOL mandates that employers pay H-2B workers the prevailing wage rate, without authority to investigate compliance, employers' obligations are rendered hollow.⁹⁰ Therefore, authority to implement H-2B regulations is

86. See BRUNO, *supra* note 21, at 5–6.

87. See *Castellanos-Contreras*, 488 F. Supp. 2d at 571.

88. See *id.* at 572 n.5. The court relied on *Arriaga v. Florida Pacific Farms, L.L.C.*, which established that H-2A workers must be reimbursed by employers for such costs, as “extremely persuasive precedent” to apply similar reimbursement in H-2B cases. *Id.*

89. 29 C.F.R. § 501.5 (2006).

90. See CLOSE TO SLAVERY, *supra* note 12, at 8, 29.

critical so that DOL may ensure employers abide by its rules. Otherwise, such requirements are essentially meaningless.

Importantly, DOL not only should possess authority to investigate and enforce program regulations, the agency also should have power to punish errant employers. DOL should be able to exclude employers that violate H-2B program standards from participating in the program in the future, as well as charge them meaningful penalties. H-2B employers, seeking to run profitable businesses, are most likely to abide by rules that have consequences for violations, especially when the consequences impact profit or bar participation in a program that fulfills labor needs.

Most important to ensuring that DOL has opportunity to act, though, is providing the agency with the means to execute and enforce its authority. Although providing DOL with resources sufficient to stand behind its power likely requires an appropriations grant not immediately ascertainable, allocation of funds is nevertheless a necessity. As SPLC suggested, even with its authority secure, DOL enforcement of H-2A regulations may be scarce.⁹¹ Thus, it is unlikely that without necessary resources DOL would, or could, investigate and respond to H-2B labor protection violations. Funding to DOL should cover costs of hiring additional employees, maintaining office space regionally throughout the United States, and implementing necessary procedures so that the agency might actively pursue its mission.

III. DESPITE CRITICS' ALLEGATIONS THAT H-2B PROVISIONS LEAVE WORKERS VULNERABLE TO ABUSE, MANY H-2B WORKERS THRIVE AS PART OF THE PROGRAM

A. *Critics Assert the Current H-2B Program Allows Workers to Suffer Exploitation and Abuses at the Hands of Formidable Employers*

Critics, such as SPLC, claim that current mobility limitations on the H-2B program, combined with workers' severe debt and submissive natures, make workers likely to suffer exploitation

91. *Id.* at 29.

and abuses at the hands of formidable employers.⁹² SPLC has asserted that because the current H-2B program binds employees to a single employer, and because many H-2B workers arrive in the United States desperate for compensation so they can repay debts, workers are likely to endure any task or treatment imposed upon them just so they can stay in the United States to work.⁹³ Moreover, one author has alleged that employers, without regard for workers as individual human beings, choose employees based solely on their propensity to obey demands.⁹⁴

The H-2B program permits workers to come to the United States for a temporary period, depending on the pre-approved needs of an employer, and workers must generally remain with that employer for the duration of their stay.⁹⁵ SPLC reported that because employers hold the “deportation card,” “the balance of power between employer and worker is skewed so disproportionately in favor of the employer that, for all practical purposes, the worker’s rights are nullified.”⁹⁶ Likewise, one author has asserted:

The ability of employers to blacklist workers who make complaints, and to deny re-entry with temporary worker visas, is a critical flaw of the H-2 program . . . [P]ermitting a worker to retain her legally-authorized status, only so long as she remains employed by a particular employer, is inherently a form of compulsory servitude . . .⁹⁷

SPLC has alleged that, in the face of threats from employers under the current system of inequitable power distribution, H-2B workers live in fear of retaliation by deportation and must therefore submit to any treatment an employer chooses to impose.⁹⁸ As one article put it, because of H-2B workers’ “precarious legal status, it may not be a wise strategy . . . to ‘rock the boat’ at work” when employers have full discretion in determining the fate of resistant workers for both the present and the future work period.⁹⁹

92. See, e.g., *id.* at 2, 9, 14, 17, 36.

93. See *id.* at 1–2, 9.

94. See Rachel Bloomekatz, Comment, *Rethinking Immigration Status Discrimination and Exploitation in the Low-Wage Workplace*, 54 UCLA L. REV. 1975–76 (2007).

95. See 8 U.S.C. § 1101(a)(15)(H)(ii)(b) (2000); 8 C.F.R. 214.2(h)(2)(i)(C), (D) (2007).

96. CLOSE TO SLAVERY, *supra* note 12, at 15.

97. Read, *supra* note 16, at 431.

98. See CLOSE TO SLAVERY, *supra* note 12, at 16.

99. Bloomekatz, *supra* note 94, at 1973–74.

Compounding the plight of H-2B workers, SPLC has claimed, is the fact that workers often arrive in the United States deeply in debt and willing to do any work that will yield much-needed compensation.¹⁰⁰ SPLC found laborers typically are indebted between \$500 and \$10,000 by the time they arrive in the U.S. to work.¹⁰¹ H-2B workers often pay private recruiting agencies to handle their connection to a U.S. employer, and they must also pay for costs of their visa and travel that their employers do not necessarily reimburse.¹⁰²

It has also been argued that H-2B workers are far more susceptible to employer abuse than U.S. workers because U.S. citizens have permanent status, an ability to seek government benefits, and more easily attain other work.¹⁰³ Further, critics allege employers intentionally choose certain workers who will accept their vulnerable status without struggle—"workers who, once hired, will comply with what the manager dictates and 'do the job as told, with the minimum amount of lip' . . . [so that employers] have more power over their workforce . . . [and can ensure] that the workforce always meets their demands."¹⁰⁴

B. *Despite Claims of Worker Abuse, Many Contrary Accounts Suggest Otherwise*

Although critics argue the H-2B program exploits and endangers vulnerable immigrant workers, a deluge of media reports from across the United States belie the claims of critics who compare the program to servitude. Instead, these reports suggest workers encounter invitations to return annually and fair compensation, along with reasonable and business-oriented employers.¹⁰⁵

100. See CLOSE TO SLAVERY, *supra* note 12, at 9.

101. See *id.*

102. See *id.*; cf. *Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228, 1237 (11th Cir. 2002) (holding employers of H-2A must reimburse travel and visa costs to workers under FLSA).

103. Bloomekatz, *supra* note 94, at 1975.

104. *Id.* at 1971 (quoting ROGER WALDINGER & MICHAEL I. LICHTER, HOW THE OTHER HALF WORKS: IMMIGRATION AND THE SOCIAL ORGANIZATION OF LABOR 15 (2003)).

105. See, e.g., John Flesher, 'We've Been Doing This for Years,' GRAND RAPIDS PRESS, June 13, 2007, at C1; Tim Logan, 'San Luis' Is Home Away from Home for Landscape Workers, ST. LOUIS POST-DISPATCH, Sept. 3, 2007, at A1; Linda Lutton, *Grass Is Greener in St. Louis*, ST. LOUIS POST-DISPATCH, Sept. 2, 2007, at A1.

1. Numerous Accounts Have Depicted Successful and Continuing Relationships that Have Developed Under the H-2B Program

The media's portrayal of flourishing and enduring relationships between H-2B employers and workers—especially workers who return each year—suggests that both employers and workers benefit satisfactorily through the program.¹⁰⁶ For instance, in St. Louis, where landscaping industry employers rank first among H-2B employers,¹⁰⁷ a second generation of workers from La Esperanza, Mexico, is now ready to follow in the footsteps of its predecessors and take on the city's available landscaping positions.¹⁰⁸ "La Esperanza feels like a company town—except that the company is 1,600 miles away."¹⁰⁹ Top Care Lawn Services, Inc., the top user of H-2B visas in the St. Louis area, has been signing up workers from La Esperanza to participate in the H-2B program for about ten years and its competitors quickly followed the same path.¹¹⁰ Rafa Delgado, a La Esperanza native, is now in his ninth year as a guest worker for Loyet Landscape Maintenance, a Top Care competitor, and he is a salaried supervisor.¹¹¹

Although employers must demonstrate their needs annually to DOL in order to qualify to host H-2B workers, "most from La Esperanza are so certain of their positions from year to year that they leave clothes and cars in St. Louis while returning to Mexico to reapply for another temporary visa."¹¹² Likewise, employers count on the continued interest and loyalty of workers who come to them through the H-2B program: "We would not be in business without it," said the owner of Dowco Enterprises, a St. Louis-based landscaping company.¹¹³

But the positions that La Esperanza workers return to claim each year are more than just consistently available to the work-

106. See, e.g., Logan, *supra* note 105; Lutton, *supra* note 105.

107. The landscaping industry also topped the list of H-2B occupations that DOL certified in FY 2006 at 62,208 workers certified. OFFICE OF FOREIGN LABOR CERTIFICATION, U.S. DEP'T OF LABOR, FOREIGN LABOR CERTIFICATION: INTERNATIONAL TALENT HELPING MEET EMPLOYER DEMAND 18 (2006).

108. Lutton, *supra* note 105.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. Logan, *supra* note 105.

ers; they are monetarily beneficial, too. For instance, unskilled workers in La Esperanza, Mexico, can make only about \$12 a day doing field work, \$1 per five-gallon bucket of strawberries they pick, or perhaps \$2.30 for nailing a shoe onto each foot of a horse.¹¹⁴ The work is not even dependable: "Sometimes there's only enough strawberries to fill two buckets' in a day. That's barely enough to buy beans and tortillas needed to feed a family for a day."¹¹⁵ In contrast, working for a landscaping company in the St. Louis area, workers receive at least the prevailing minimum wage, generally beginning at \$8 to \$12 an hour.¹¹⁶ Employees who remain with the same employer long-term can increase in the ranks. Juan Alonzo, who has been coming to St. Louis to work for Dowco Enterprises for about a decade, is now a supervisor who checks on work crews and meets with clients, and he makes \$17 an hour.¹¹⁷ Many such workers send their earnings to their families in their home countries. For instance, on Maryland's Eastern Shore, workers who return each year have reported they "can make \$10,000 or more for their six- to eight-month stays here—money that can go far enough back home to build a house."¹¹⁸

The La Esperanza workers represent a growing trend of H-2B workers who have what amounts to a home-away-from-home in the United States. They have cultivated lasting and profitable relationships with certain employers or industries, and count on returning to the same locations every year. For example, in Traverse City, Michigan, hundreds of Jamaicans travel every year to staff the Grand Hotel on Mackinac Island from May to October.¹¹⁹ One employee indicated he has been traveling to the hotel to work for more than three decades: "This place is like my second home."¹²⁰

114. Lutton, *supra* note 105.

115. *Id.* Even for skilled workers, wages in St. Louis may only be about \$85 a week for an auto mechanic, but this is triple the minimum wage they would make in Mexico. *Id.*

116. Logan, *supra* note 105.

117. *Id.*

118. Kobell & Guy, *supra* note 6.

119. Flesher, *supra* note 105.

120. *Id.*

2. The Current H-2B Program—With a Cap Exemption for Returning Workers—Adequately Serves the Interests of Both Employers and Workers

Although U.S. immigration reform efforts should consider modifications to balance bargaining power under the H-2B program so that unscrupulous employers have no avenue to exploit workers, the current program—as long as it includes Senator Mikulski's cap exemption provision—preserves and promotes enduring and beneficial relationships between employers and workers.

SPLC's claim that binding H-2B workers to a single employer for the duration of their visa tips the scales of power too heavily in favor of the employer has some merit in theory, if not always in practice.¹²¹ Although myriad accounts, some of which are discussed in the preceding section, indicate SPLC has presented just one side of the story in its report, the organization correctly argues that enhanced mobility under a modified H-2B program would provide workers with an extra layer of protection against exploitative employers.¹²²

Comprehensive immigration changes proposed in Congress in 2007 included a complete overhaul of the H-2B program that would have allowed workers to move among employers during the duration of their visa.¹²³ A new program, called the Y-visa program, would have permitted visa holders sixty consecutive days to look for new work after the expiration of previous employment.¹²⁴ A worker's only limitation in acquiring a new position would be that the work come through an employer qualified to take on Y-visa seasonal workers.¹²⁵ Although a discussion of broad immigration reform efforts is outside the scope of this comment, proposed changes such as the Y-visa program seem well-positioned to augment the current H-2B program by aligning it more closely with American free labor market principles and removing the trump card from the hand of an exploitative employer.

121. See CLOSE TO SLAVERY, *supra* note 12, at 15–16.

122. See *id.* at 42.

123. S. 1639, 110th Cong. § 402 (2007).

124. *Id.*

125. *Id.*

Despite extensive efforts in 2007 by both Congress and the Bush Administration, immigration reform measures failed to gain support and “collapsed” in 2007.¹²⁶ Therefore, in the absence of large-scale modifications, Senator Mikulski’s pending cap exemption for returning H-2B workers necessitates passage. Although the cap exemption provision does not affect workers’ mobility, it does foster the development of longstanding and successful employer-employee relationships, thereby creating a disincentive for employers to attempt to exploit workers.

From an employer’s perspective, it makes utmost economical sense to retain the same H-2B workers whenever possible. Workers’ familiarity with the company and with the workload, along with employers’ knowledge of employees’ skills and work ethic, all combine to decrease costs and risks otherwise required with hiring new employees. Furthermore, without the worry of having to line up workers living outside the U.S., employers are able to attend to other business needs, freeing them from still more potential costs and risks. Reason dictates that employers benefiting—indeed, profiting—from retaining the same workers annually will not intentionally act in a way that would endanger or deter workers from returning.

Senator Mikulski’s cap exemption even further rewards participating employers. Employers hosting returning workers must only complete DOL’s certification application to determine the number of workers they are eligible to receive, and may bypass a portion of the time-consuming and uncertain visa approval process. Thus, Senator Mikulski’s cap exemption encourages employers to establish mutually beneficial connections with their H-2B workers, and to foster long-standing committed relationships between two willing parties. Simply put, employers standing to benefit so significantly from bringing back the same H-2B workers every year have no reason to jeopardize the relationship.

126. Pear & Hulse, *supra* note 2.

IV. H-2B WORKERS FILL POSITIONS AMERICANS DO NOT WANT THAT WOULD OTHERWISE BE FILLED BY ILLEGAL LABOR

A. *Accusations that H-2B Workers Take Jobs to the Disadvantage of American Workers*

Critics allege the H-2B program allows immigrant laborers to take jobs to the detriment of American workers because the program allows in too many laborers, because employers do not have to put forth any real effort to recruit American workers, and because H-2B workers artificially lower the wages of similarly employed U.S. workers. For instance, the Federation for American Immigration Reform ("FAIR"), a Washington, D.C.-based advocacy group, has claimed the current H-2B program that includes Senator Mikulski's statutory cap exemption for returning workers could, over time, "snowball into the admission of millions of temporary unskilled foreign workers taking American jobs."¹²⁷ In reaching its conclusion, FAIR, likely encapsulating the fears of many advocates for less immigration, has assumed that because the cap exemption permits employers to re-hire returning workers in addition to the 66,000 worker limit, employers will simply continue to draw from foreign sources, filling their staffs with an increasing arsenal of returning foreign laborers, gradually and overwhelmingly pushing out Americans who are available to do the work.¹²⁸

Likewise, other critics have claimed the H-2B program encourages employers to overlook available Americans, citing that the program does not require employers to exert genuine efforts to recruit American workers.¹²⁹ Opponents have asserted the shortcomings in the recruitment process lie in the program's untimely and minimal requirements.¹³⁰ The program's requirements are untimely because DOL requires four months' advance notice for certification applications.¹³¹ To meet program guidelines, employ-

127. FAIR, *The Mikulski [sic] End-Run to the Limit on Temporary Unskilled Foreign Workers (H-2B Visas)*, http://www.fairus.org/site/PageServer?pagename=mikulski_research (last visited Feb. 25, 2008).

128. *Id.*

129. Read, *supra* note 16, at 435-36.

130. *Id.*

131. See *supra* note 44 and accompanying text. Employers must apply to DOL no less than sixty days from the date they need workers, but no more than 120 days. TRAINING &

ers must advertise for the positions.¹³² Thus, as one employer explained to the *St. Louis Post-Dispatch*, if he wants to employ H-2B workers in the spring, he must apply for the visas in December.¹³³ Applying in December means he must advertise in October

for an \$8 an hour job that won't start for four months and only lasts nine. And every local company advertises at once. "The odds are, you're not going to get a lot of individuals who are going to knock your door down," Dowell said. "The system has some flaws."¹³⁴

Opponents have also protested that duties imposed on employers for marketing available positions are too minimal to effectively recruit American workers.¹³⁵ As stated previously, to be eligible for DOL certification, DOL simply mandates employers advertise the job opportunity in the job bank of its state labor agency counterpart, in a newspaper of general circulation, or in a readily available professional, trade, or ethnic publication.¹³⁶ In Pennsylvania, for example, "[n]ot only are H-2B job orders entered into the Employment Service System months before the employment period would begin, but [they] remain in the system for only ten days. Those job orders are never put into interstate circulation to recruit workers within the United States who would travel for employment."¹³⁷

Critics have also alleged that H-2B workers artificially lower the wages of American workers by allowing employers to become reliant on foreign laborers who will accept unquestioningly the wages they are offered.¹³⁸ SPLC reported "when an industry relies on guestworkers for the bulk of its workforce, wages tend to fall. Guestworkers are absolutely unable to bargain for better wages and working conditions. Over time, wages fall and the jobs become increasingly undesirable to U.S. workers, creating even more of a demand for guestworkers."¹³⁹

EMPLOYMENT GUIDANCE LETTER, *supra* note 26, at 6. Because of the high demand for H-2B visas, employers—if they want to have a chance of obtaining any visas—must essentially apply on the first day they are eligible. Logan, *supra* note 105.

132. TRAINING & EMPLOYMENT GUIDANCE LETTER, *supra* note 26, at 7.

133. Logan, *supra* note 105.

134. *Id.*

135. Read, *supra* note 16, at 435–36.

136. TRAINING & EMPLOYMENT GUIDANCE LETTER, *supra* note 26, at 7.

137. Read, *supra* note 16, at 435.

138. CLOSE TO SLAVERY, *supra* note 12, at 21.

139. *Id.*

B. *The Realities of the H-2B Program's Impacts*

1. Government Requirements of H-2B Employers Protect American Workers

Although DOL's current advertising requirements may not promote the most effective recruitment of American workers, DOL's employer certification process demands and enforces accurate representation of employers' foreign labor needs, a mechanism that capably protects American workers. Critics often do not credit the strict application standards DOL employs to admit or deny employers' participation in the H-2B program. DOL requires satisfaction of specific criteria and reviews each application individually before it will certify that an employer is eligible to participate in the H-2B program.¹⁴⁰ Thus, an assessment such as the one put forth by FAIR—that a statutory cap exemption for returning workers will allow potentially millions of temporary foreign laborers into the country—erroneously ignores the fact that that potential H-2B employers must survive DOL's rigorous certification procedures that serve as a bar to keep out an overwhelming populous of laborers.

Upon receipt of an employer's application, DOL's Employment and Training Administration Office of Foreign Labor Certification verifies an employer's application that no American workers are available.¹⁴¹ Among other conditions to meet this standard, employers must show the salary they are offering will not adversely affect the wages or working conditions of workers similarly employed, and they must stipulate the number of workers they are seeking and when they need them, in accordance with their demonstrated labor needs.¹⁴² To ensure DOL's voluminous application has been completed accurately, many employers hire outside assistance, simply because any inaccuracies or oversights will cause DOL to reject the employer's application.¹⁴³

In FY 2006, DOL reported that of 11,267 employer applications received for 247,287 workers, 9182 applications for 199,734 work-

140. See TRAINING & EMPLOYMENT GUIDANCE LETTER *supra* note 26 at 4–8.

141. *Id.* at 8.

142. *Id.* at 8–9.

143. See, e.g., Susana Enriquez & Mitchell Freedman, *Visa Denials Hit Hard in the Hamptons*, NEWSDAY, Apr. 5, 2007, at A07.

ers were certified,¹⁴⁴ meaning DOL approved approximately eighty-one percent of the applications.¹⁴⁵ Thus, an employer's submission of application to DOL is by no means a guarantee of certification. In fact, employers have reported denials from DOL based on even simple errors such as minor inconsistencies within the application for dates of labor needs, or improper proof of advertisement efforts.¹⁴⁶

Admittedly, required marketing efforts imposed on employers under the H-2B program are not as well-suited to recruitment of U.S. workers as they could be.¹⁴⁷ As discussed above in Part A, although prospective H-2B employers must demonstrate they made required efforts to recruit American workers for the position, employers generally advertise months in advance, and only for a short period of time.¹⁴⁸ As one St. Louis-based employer indicated, the program requirements do not often yield many—if any—responses from American workers.¹⁴⁹

Therefore, perhaps any future H-2B reform efforts should include modification to standards of recruiting effort of U.S. workers. On the other hand, as is discussed in the following paragraphs, substantial evidence suggests that despite advertisement rules that do not successfully produce American workers, H-2B workers are not taking jobs to the detriment of American workers.

2. H-2B Workers Often Fill Spots that American Workers Are Not Likely to Take

Claims that H-2B workers take U.S. jobs away from willing American workers ignore key realities: H-2B-eligible work is usually seasonal and sometimes involves unglamorous and strenuous labor.¹⁵⁰ For example, the seasonal nature of hospitality and tourism-based work in Myrtle Beach, South Carolina, highlights the

144. OFFICE OF FOREIGN LABOR CERTIFICATION, *supra* note 107, at 13.

145. *See id.* The eighty-one percent approved by DOL for H-2B visas compares to approval of 377,656 of 385,835 (98%) of H-1B applications and 6550 of 6717 (97.5%) of H-2A applications. *Id.*

146. Enriquez & Freedman, *supra* note 143.

147. *See supra* notes 132–34 and accompanying text.

148. *Id.*

149. Logan, *supra* note 105.

150. *See, e.g.,* Logan, *supra* note 105.

need for a temporary labor force that logically must come from foreign sources.¹⁵¹ As South Carolina's Hospitality Association president explained,

As the areas of our state that attract the most tourists have low residential populations as compared to the size of the community during peak tourism season, there are not enough local residents, or people willing to drive some distance to fill the jobs needed to help grow the state's No. 1 industry, let alone sustain it.¹⁵²

Similarly, the general manager of a resort near Marble Falls, Texas, pointed out, "We're in a rural area We have a tough time finding workers out here. It would be pretty near impossible to run this business' without the H-2Bs."¹⁵³

Furthermore, the nature of the work often turns away American workers. One employer said that he "tried hiring [Americans] from felony release programs, talking with temp agencies, paying all kinds of salaries. (People literally show up one day, take a look, and say I'm not doing this.)"¹⁵⁴ Likewise, Harry Phillips, who owns Russell Hall Seafood in Maryland, said of his employees, "We have American people in the offices, we hire a lot of American people, but we can't find American people to pick crabs."¹⁵⁵

3. Evidence Has Demonstrated When Employers Cannot Access H-2B Workers, They Are Inclined to Turn to Undocumented Workers

Reports that some employers bring on undocumented workers when efforts to access H-2B workers fail highlights that illegal aliens—not H-2B workers—are most detrimental to American workers, and highlights the importance of enacting Senator Mikulski's cap exemption provision. The National Foundation for American Policy ("NFAP") has reported that employers who are shut out of participating in the H-2B program tend to turn to un-

151. See Jim Faber, *Seasonal Labor Tap Turned Off*, MYRTLE BEACH SUN NEWS, Oct. 7, 2007, at C3.

152. *Id.*

153. Karen Robinson-Jacobs & Brendan M. Case, *A Guest Worker Program Is Shrinking Despite High Demand in Texas*, DALLAS MORNING NEWS, Oct. 1, 2007.

154. Logan, *supra* note 105.

155. Dixon & Hopkins, *supra* note 7.

documented workers to fill their labor needs.¹⁵⁶ NFAP emphasized that “[i]t would seem naive to think that denying U.S. employers access to H-2B visa holders will result in a massive increase in hiring native-born U.S. workers. In fact, it is likely that the absence of legal temporary workers will mean more illegal immigration.”¹⁵⁷

In response to criticism that H-2B workers harm American workers by artificially lowering wages, NFAP has indicated it is not H-2B workers who negatively impact earnings, but illegal workers: “Reliable data show that legal workers command higher salaries than those here illegally. In other words, preventing businesses from hiring H-2B workers will logically mean more competition for natives with illegal immigrants who possess less bargaining power and earn lower wages than H-2B workers.”¹⁵⁸ NFAP has pointed out that employers must pay H-2B workers prevailing wages for their position—the same wages to which similarly employed American workers are entitled, whereas undocumented workers, obviously, have no such express protections.¹⁵⁹

Reports that employers likely turn to undocumented workers to meet labor needs when they cannot access the H-2B program underscore the danger of capping the number of annually available H-2B visas at an arbitrarily low figure. NFAP’s findings unambiguously show that many illegal immigrants have been found to hold jobs that are often occupied by H-2B visa holders, and because the “occupations are generally common to illegal immigrants, this . . . demonstrate[s] that blocking the entry of additional workers on H-2B visas is more likely to increase the use of unauthorized workers.”¹⁶⁰

In fact, under comprehensive immigration reform proposals considered in Congress in 2007 such as the new Y-visa program, the number of legal temporary workers permitted annually would have been increased significantly to approximately half a mil-

156. See NAT’L FOUND. FOR AM. POLICY, H-2B VISAS: PROVIDING A LEGAL REGIME FOR U.S. EMPLOYERS 1 (2005), available at <http://www.nfap.com/researchactivities/studies/H2BVISAS2005.pdf>.

157. *Id.* at 1.

158. *Id.* at 1–2.

159. *Id.*

160. *Id.* at 5.

lion.¹⁶¹ The nearly ten-fold increase “would not be additions to the population; they would be the same migrants who are arriving today illegally. ‘It sounds like a large number, but that’s because we’d be counting them instead of pretending that they’re not here,’” Deborah Meyers, a senior analyst with the Migration Policy Institute, told the *San Francisco Chronicle*.¹⁶²

In the absence of any comprehensive panacea to the H-2B program, however, Senator Mikulski’s proposed cap exemption serves as a suitable palliative. As NFAP’s findings have demonstrated, setting the number of available H-2B visas too low encourages employers to circumvent the system. As recent years have demonstrated, each fiscal year employers immediately snap up the 66,000 available H-2B visas, leaving many other employers—who have been certified by DOL as eligible to host H-2B workers—with no opportunity to access the program.¹⁶³

For instance, because Senator Mikulski’s returning worker cap exemption has not yet been re-approved, USCIS announced on January 3, 2008, that all visas for the period from April to October 2008 were taken.¹⁶⁴ In years where the exemption was in effect, however, more employers were able to access the program. For the period from April to October 2006, USCIS accepted visa applications until April 4, 2006;¹⁶⁵ from April to October 2007, USCIS accepted visa applications until March 16, 2007.¹⁶⁶ Therefore, with some employers’ needs covered under the exemption for returning workers, the H-2B program was able to support additional employers, almost certainly helping to alleviate some of their labor needs, and thereby preventing them from turning to alternative—potentially illegal—sources of available labor to keep their businesses afloat.

161. Carolyn Lochhead, *Guest Workers Have a Long History in U.S.*, S.F. CHRON., June 4, 2007, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=c/a/2007/06/04/MNGLJQ755U1.DTL>.

162. *Id.*

163. See NAT’L FOUND. FOR AM. POLICY, *supra* note 156, at 1.

164. See Press Release, U.S. Citizenship & Immigration Servs., *supra* note 40.

165. Press Release, U.S. Citizenship & Immigration Servs., USCIS Reaches H-2B Cap for Second Half of Fiscal Year 2006 (Apr. 6, 2006), available at http://www.uscis.gov/files/pressrelease/H2BFY06cap_06Apr06PR.pdf.

166. Press Release, U.S. Citizenship & Immigration Servs., USCIS Reaches H-2B Cap for Second Half of Fiscal Year 2007 (Mar. 23, 2007), available at <http://www.uscis.gov/files/pressrelease/H2BCap2ndHalfFY07March2307.pdf>.

Yet, because Congress has failed to renew Senator Mikulski's cap exemption provision for FY 2008, once again countless employers have been shut out from the H-2B program because their labor needs are still more than four months away. Many such businesses cannot survive without the foreign laborers upon whom they have become dependent, and those that can survive face certain losses. Denied congressional assistance via Senator Mikulski's provision, and backed into a corner with seemingly no other options, it seems certain that at least some employers' survival instincts will lead them to consider using undocumented workers.

V. CONCLUSION: DESPITE SEVERAL LIMITATIONS, THE H-2B PROGRAM SERVES EMPLOYERS AND WORKERS ALIKE, AND IT MUST ENDURE TO PRESERVE THE FUTURE OF ITS DEPENDENT AMERICAN BUSINESSES

Notwithstanding the hotly debated shortcomings of the H-2B program, its prominence within the American labor industry is undeniable. The presence of H-2B workers unquestionably influences the success of American workers and American businesses—notably, those that are small and seasonal. Moreover, myriad reports of H-2B workers indicate employers are fostering respectful, valuable, and enduring relationships with the H-2B workers they employ.

Certainly, some weak aspects of the program demand immediate attention. H-2B workers deserve explicit labor protections that will ensure they can work in the American marketplace prosperously, healthfully, and fairly. Furthermore, as an additional protection for workers, as well as a benefit for employers, Senator Mikulski's proposed statutory cap exemption for returning workers must be approved. The cap exemption promotes mutually beneficial and longstanding relationships between employers and workers, lending security to employers that they will not be arbitrarily denied access to workers who can help fulfill their government-certified labor needs, and offering an extra layer of protection to workers against potentially power-hungry employers. Moreover, as the number of illegal undocumented workers in the United States continues to grow, the H-2B program provides a legal means by which both employers and workers can benefit.

Proposals for immediate changes should not discount the possibility that comprehensive immigration reform may be the best method to address and change innate shortcomings of the H-2B program. No large-scale reform measures passed Congress in 2007, however, and no additional efforts have appeared—or likely will appear—on the horizon.

In the absence of any immigration overhaul, the H-2B program is viable in its current form. Indeed, it is necessary to keep many businesses afloat. To promote growing economies, like the landscaping industry in St. Louis, to support localities that are vacation hubs during just part of the year, like Myrtle Beach, and to preserve generations-old industries, as on the Eastern Shore of Maryland, the H-2B program must endure.

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