Congressional Research Service
Informing the legislative debate since 1914

H-2A and H-2B Temporary Worker Visas: Policy and Related Issues

Updated May 10, 2017

Congressional Research Service
https://crsreports.congress.gov
R44849

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

Under current law, certain foreign workers, sometimes referred to as guest workers, may be admitted to the United States to perform temporary service or labor under two temporary worker visas: the H-2A visa for agricultural workers and the H-2B visa for nonagricultural workers. Both programs are administered by the Department of Homeland Security (DHS) and the Department of Labor (DOL).

The H-2A and H-2B programs—and guest worker programs broadly—strive both to be responsive to legitimate employer needs for temporary labor and to provide adequate protections for U.S. and foreign temporary workers. There is much debate, however, about how to strike the appropriate balance between these goals.

Bringing workers into the United States under either the H-2A or H-2B program is a multiagency process involving DOL, DHS, and the Department of State (DOS). As an initial step in the process, a prospective H-2A or H-2B employer must apply for DOL labor certification to ensure that U.S. workers are not available for the jobs in question and that the hiring of foreign workers will not adversely affect the wages and working conditions of U.S. workers. After receiving labor certification, the employer can submit an application, known as a petition, to DHS to bring in foreign workers. If the application is approved, a foreign worker who is abroad can then go to a U.S. embassy or consulate to apply for an H-2A or H-2B nonimmigrant visa from DOS. If the visa application is approved, the worker is issued a visa that he or she can use to apply for admission to the United States at a port of entry.

Major guest worker reform legislation was last considered in the 113th Congress. Since then, guest worker bills typically have proposed to change particular aspects of the existing H-2A and H-2B visas.

Legislative action in recent years has focused on the H-2B visa, specifically the statutory numerical limitation on the visa and H-2B regulatory provisions. Regarding the H-2B numerical limitation, the Consolidated Appropriations Act, 2016 (P.L. 114-113) provided that a returning H-2B worker who had been counted against the statutory cap in FY2013, FY2014, or FY2015 would not be counted again in FY2016. This provision expired at the end of FY2016. For FY2017, related language in the Consolidated Appropriations Act, 2017 (P.L. 115-31) provides for the issuance of H-2B visas beyond the statutory limit under certain conditions.

Guest worker proposals may contain provisions on a range of component policy issues. Key policy considerations for Congress include the labor market test to determine whether U.S. workers are available for the positions, required wages, and enforcement. The issue of unauthorized workers also arises in connection with guest worker programs.

Contents

Introduction 1
Overview of H-2A and H-2B Visas 1
Temporary Labor Certification 2
H-2A Agricultural Worker Visa 3
Visa Issuances 3
H-2A Statutory Provisions 4
H-2A Regulations 5
DHS Regulations on the H-2A Visa 5
DOL Regulations on H-2A Employment 5
H-2B Nonagricultural Worker Visa 7
Visa Issuances 7
H-2B Statutory Provisions 8
H-2B Regulations 9
DHS Regulations on the H-2B Visa 9
DHS/DOL Regulations on H-2B Employment 10
Legislative Activity 11
Policy Considerations 12
Program Administration 13
Labor Market Test 14
Wages 15
Temporary or Seasonal Nature of Work 15
Numerical Limits 16
Treatment of Family Members 17
Enforcement 17
Unauthorized Workers 18
Conclusion 19

Figures

Figure 1. Bringing in H-2A and H-2B Workers 2
Figure 2. H-2A Visas Issued, FY1992-FY2016 4
Figure 3. H-2B Visas Issued, FY1992-FY2016 8

Tables

Table A-1. Top 10 States Granted H-2A Labor Certifications: FY2014 and FY2015 20
Table A-2. Top 10 States Granted H-2B Labor Certifications: FY2014 and FY2015 20
Table B-1. Number of Certified H-2B Positions by Occupation, FY2015 21
Table C-1. Number of H-2A and H-2B Visas Issued, FY1992-FY2016 22

Appendixes

Appendix A. DOL H-2A and H-2B Labor Certifications by State 20
Appendix B. DOL H-2B Labor Certifications by Occupation 21
Appendix C. H-2A and H-2B Visa Issuances 22
Appendix D. Background Information on H-2A and H-2B Regulations 23

Contacts

Author Information 25

Introduction

The United States has a long history of importing foreign temporary workers to fill jobs that are low skilled or do not require much formal education. These workers are sometimes referred to as guest workers. In the past, guest workers were used to address U.S. worker shortages during times of war. Notably, the controversial Bracero program, which began during World War II and lasted until 1964, brought several million Mexican agricultural workers into the United States.

Today, the Immigration and Nationality Act (INA)[1] provides for the temporary admission of agricultural and nonagricultural workers to the United States through the H-2A and H-2B visa programs, respectively. These programs, which are subject to detailed recruitment and other requirements, seek to meet the legitimate temporary labor needs of employers while providing protections to U.S. and foreign workers.

The difficulty in balancing the needs of employers and workers in guest worker programs is reflected in ongoing debates about such programs. Some view guest worker programs as a beneficial source of legal workers and call for their reform and expansion.[2] Others view them, in their current forms, as "inherently abusive" and argue that if they are to be allowed to continue operating, they must be thoroughly overhauled.[3]

This report covers the H-2A agricultural guest worker program and the H-2B nonagricultural guest worker program. It explores the statutory and regulatory provisions that govern each program, focusing in particular on the much-debated labor certification process. It discusses past and present legislative efforts to reform the H-2A and H-2B programs and to create new guest worker visas, and identifies and analyzes key policy considerations to help inform future congressional action.

Overview of H-2A and H-2B Visas

The INA enumerates categories of aliens, known as nonimmigrants, who are admitted to the United States for a temporary period of time and specific purpose. Nonimmigrant visa categories are identified by letters and numbers, based on the sections of the INA that authorize them. Among the major nonimmigrant visa categories is the "H" category for temporary workers. It includes H-2A and H-2B visas for guest workers,[4] as well as visas for higher-skilled temporary workers.[5]

The INA, as originally enacted in 1952, authorized an H-2 nonimmigrant visa category for foreign agricultural and nonagricultural workers who were coming temporarily to the United States to perform temporary services (other than those of an exceptional nature requiring distinguished merit and ability) or labor. The 1986 Immigration Reform and Control Act (IRCA)[6]

---

[1] Act of June 27, 1952, ch. 477, codified, as amended, at 8 U.S.C. §1101 et seq. The INA is the basis of current immigration law.

[2] See, for example, David Bier, "Guest Workers Can Help End Illegal Immigration," Competitive Enterprise Institute, November 27, 2012, https://cei.org/blog/guest-workers-can-help-end-illegal-immigration.

[3] See Southern Poverty Law Center, *Close to Slavery: Guestworker Programs in the United States*, 2013 edition, https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf.

[4] INA §§101(a)(15)(H)(ii)(a), (b); 8 U.S.C. §§1101(a)(15)(H)(ii)(a), (b).

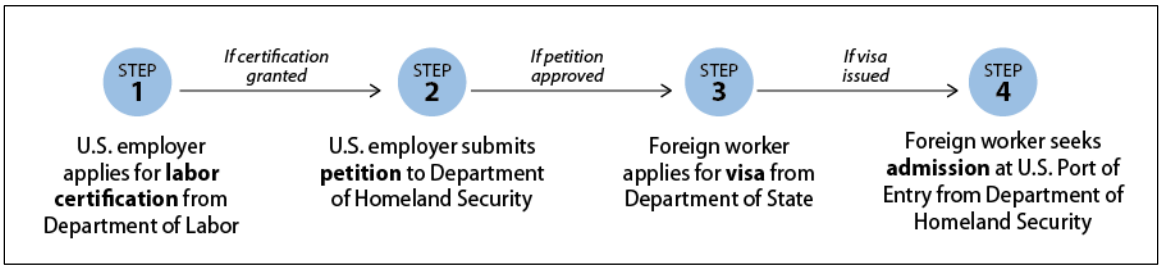
[5] For information on high-skilled temporary workers, see CRS Report R43735, *Temporary Professional, Managerial, and Skilled Foreign Workers: Policy and Trends*.

[6] P.L. 99-603, November 6, 1986.

amended the INA to subdivide the H-2 program into the current H-2A agricultural worker program and H-2B nonagricultural worker program and to detail the admissions process for H-2A workers. The H-2A and H-2B programs are administered by U.S. Citizenship and Immigration Services (USCIS) of the Department of Homeland Security (DHS) and the Employment and Training Administration (ETA) of the Department of Labor (DOL).

While there are many differences between the H-2A and H-2B programs, the process of bringing in workers under either one entails the same steps. Employers who want to hire workers through either program must first apply to DOL for labor certification. After receiving labor certification, a prospective H-2A or H-2B employer can submit an application, known as a petition, to DHS to bring in foreign workers. If the application is approved, foreign workers who are abroad can then go to a U.S. embassy or consulate to apply for an H-2A or H-2B nonimmigrant visa from the Department of State (DOS). If the visa application is approved, the worker is issued a visa that he or she can use to apply for admission to the United States at a port of entry.[7]

Figure 1. Bringing in H-2A and H-2B Workers



Source: CRS presentation of information from U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services.

Temporary Labor Certification

DOL's ETA administers the labor certification process under the H-2A and H-2B programs. Under both programs, employers submit applications in which they request certification for a particular number of positions. (See **Appendix A** for labor certification data for selected states.)

INA provisions on the admission of H-2A workers state that an H-2A petition cannot be approved unless the petitioner has applied to DOL for certification that

> (1) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and at place needed, to perform the labor or services involved in the petition and
>
> (2) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.[8]

There is no equivalent statutory labor certification requirement for the H-2B visa. The INA, however, does contain some related language. For example, it defines an H-2B alien, in relevant part, as an alien "who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be

[7] If the worker is already in the United States, there is no visa application step.

[8] INA §218(a)(1)(A), (B); 8 U.S.C. §1188(a)(1)(A), (B) .

found in this country."[9] The H-2B labor certification requirement instead appears in DHS regulations, which state:

> The petitioner may not file an H-2B petition unless the United States petitioner has applied for a labor certification with the Secretary of Labor ... and has obtained a favorable labor certification determination.[10]

The H-2A and H-2B labor certification requirements are intended to provide job, wage, and working conditions protections to U.S. workers. They are implemented in both programs through a multifaceted labor certification process that requires prospective H-2A and H-2B employers to conduct recruitment for U.S. workers and offer minimum levels of wages and benefits that vary by program.

H-2A Agricultural Worker Visa

The H-2A visa allows for the temporary admission of foreign workers to the United States to perform agricultural labor or services of a seasonal or temporary nature. It is governed by provisions in the INA and by regulations issued by DHS and DOL. H-2A workers may perform "agriculture" or "agricultural labor," as these terms are defined in certain laws,[11] and other specified agricultural activities, including the pressing of apples for cider on a farm, logging, and range herding and livestock production.

Visa Issuances

The H-2A visa program is not subject to a statutory numerical limit and has grown significantly over the last 25 years. One way to measure the H-2A program's growth is to consider changes in the number of H-2A visas issued annually by DOS.[12] The visa application and issuance process occurs after DOL has granted labor certification and DHS has approved the visa petition (see **Figure 1**). As illustrated in **Figure 2**, the number of H-2A visas issued has increased relatively sharply in the last few years, with visa issuances more than doubling between FY2011 and FY2016.[13] The H-2A program nevertheless remains small relative to total hired farm employment.[14]

[9] INA §101(a)(15)(H)(ii)(b); 8 U.S.C. §1101(a)(15)(H)(ii)(b).

[10] 8 C.F.R. §214.2(h)(6)(iii)(C).

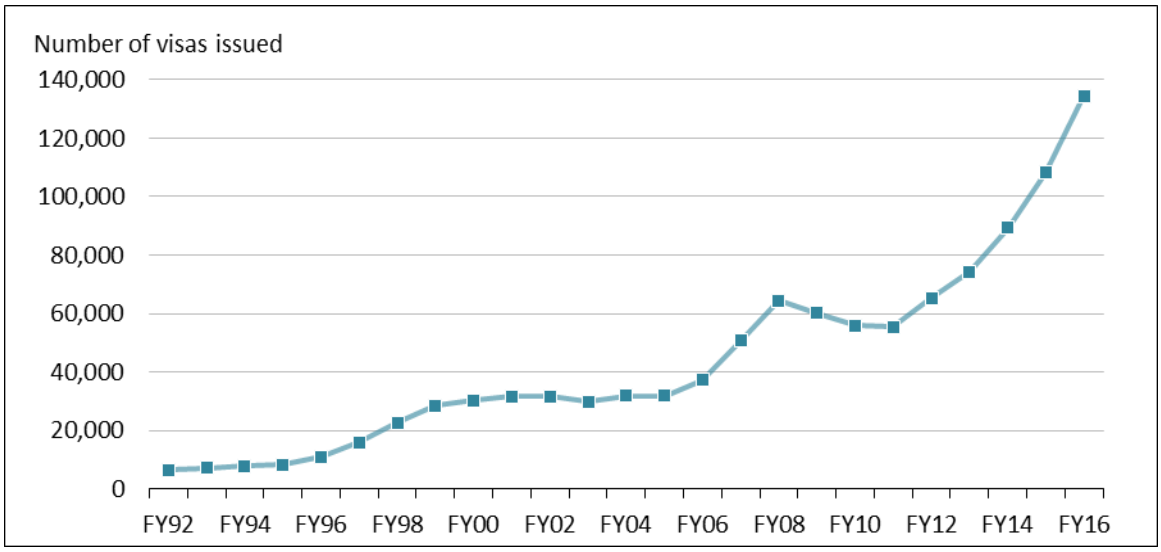
[11] The laws are enumerated in the INA definition of an H-2A worker, INA §§101(a)(15)(H)(ii)(a); 8 U.S.C. §1101(a)(15)(H)(ii)(a).

[12] There is no precise measure available of the number of aliens granted H-2A status in any given year. Visa data provide an approximation but are subject to limitations, including that not all aliens who are issued visas necessarily use them to enter the United States.

[13] See **Appendix C** for annual H-2A visa issuance data.

[14] In 2016, the average annual number of hired farm workers (excluding agricultural service workers, who work on a contract or "fee for service" basis) in the United States (excluding Alaska) was 730,800. U.S. Department of Agriculture, National Agricultural Statistics Service, *Farm Labor*, November 17, 2016, http://usda.mannlib.cornell.edu/usda/current/FarmLabo/FarmLabo-11-17-2016.pdf.

Figure 2. H-2A Visas Issued, FY1992-FY2016



Source: CRS presentation of data from U.S. Department of State, Bureau of Consular Affairs.

Note: See **Appendix C** for underlying data.

H-2A Statutory Provisions

The H-2A visa is subject to a set of conditions and rules described in INA §218. As illustrated in **Figure 1**, prospective H-2A employers must first apply to DOL for labor certification. To approve an application for labor certification, DOL must determine that qualified U.S. workers are not available to fill the job openings and that the employment of foreign workers will not adversely affect similarly employed U.S. workers (e.g., by lowering wages).

U.S. worker recruitment is a key component of the H-2A labor certification process. As required by the INA, the prospective H-2A employer's job offer is circulated through an interstate employment system to recruit qualified U.S. workers. The employer also may be required to engage in additional recruitment in a "multi-state region of traditional or expected labor supply."[15] INA provisions on the H-2A visa include a *fifty percent rule*, under which employers are required to hire any qualified U.S. worker who applies for a position during the first half of the work contract under which the H-2A workers who are in the job are employed.[16]

By law, DOL cannot require a prospective H-2A employer to submit a labor certification application more than 45 days before the employer's date of need for workers. And if the employer has complied with the recruitment and other certification requirements and eligible U.S. workers have not been found to fill the job openings, DOL must issue a labor certification no later than 30 days before the employer's date of need. Among the other statutory labor certification requirements, employers must provide workers with housing in accordance with regulations.

[15] INA §218(b)(4); 8 U.S.C. §1188(b)(4).

[16] This rule was originally made effective by law for three years beginning in 1987 but remains in place by regulation.

The INA permits the filing of H-2A labor certification applications and petitions by agricultural associations.[17] In addition, it authorizes DOL to take actions, such as imposing penalties, to ensure employer compliance with the terms and conditions of H-2A employment.

H-2A Regulations

Regulations issued by DHS and DOL implement the INA provisions on the H-2A visa (see **Appendix D** for background information on selected H-2A regulations).

DHS Regulations on the H-2A Visa

DHS regulations govern the admission of H-2A workers to the United States.[18] The current DHS rule on the H-2A visa describes its purpose as being "to provide agricultural employers with an orderly and timely flow of legal workers, thereby decreasing their reliance on unauthorized workers, while protecting the rights of laborers."[19]

DHS regulations require petitioning H-2A employers to establish that the employment for which they are seeking workers is of a temporary or seasonal nature. In general, DHS regulations consider work to be of a temporary nature when the employer's need for the worker will last no longer than one year.

An H-2A worker can be admitted to the United States up to one week before the start of the approved H-2A petition period in order to travel to the work site and may remain in the country for 30 days after the petition expires in order to prepare to depart or to seek an extension of stay based on a subsequent job offer. An employer can apply to extend an H-2A worker's stay in increments of up to one year, but an alien's total period of stay as an H-2A worker may not exceed three consecutive years. An alien who has spent three years in the United States in H-2A status may not seek an extension of his or her stay or be readmitted to the United States as an H-2A worker until he or she has been outside the country for three months.

DHS regulations limit participation in the H-2A program to nationals of countries designated annually by DHS, with the concurrence of DOS.[20] Regulations also prohibit payments by prospective H-2A workers to employers, recruiters, or other employment service providers where the payments are a condition of obtaining H-2A employment.

DOL Regulations on H-2A Employment

DOL regulations on the H-2A visa include regulations by the Employment and Training Administration (ETA) concerning H-2A labor certification.[21] ETA regulations implement the requirement that before an employer can petition for H-2A workers, the employer must apply for

[17] For purposes of the H-2A program, an agricultural association is a nonprofit or cooperative association of farmers, growers, or ranchers that performs certain functions, such as recruiting or transporting workers.

[18] 8 C.F.R. §214.2(h)(5).

[19] U.S. Department of Homeland Security, "Changes to Requirements Affecting H-2A Nonimmigrants," 73 *Federal Register* 76891, December 18, 2008 (hereinafter cited as 2008 DHS H-2A rule).

[20] On October 26, 2016, DHS published a notice, effective on January 18, 2017, for one year, identifying 85 countries whose nationals are eligible to participate in the H-2A program. See U.S. Department of Homeland Security, "Identification of Foreign Countries Whose Nationals Are Eligible to Participate in the H-2A and H-2B Nonimmigrant Worker Programs," 81 *Federal Register* 74468, October 26, 2016. The notice discusses the factors considered in designating eligible countries.

[21] 20 C.F.R. Part 655, Subpart B.

certification that U.S. workers are not available to fill the positions and that the employment of foreign workers will not adversely affect the wages or working conditions of U.S. workers.

ETA regulations detail the process for prospective H-2A employers to recruit U.S. workers. The employer must submit a job order containing the terms and conditions of employment to the DOL-funded state workforce agency (SWA)[22] serving the area of intended employment before the employer can submit a labor certification application. The job order becomes the basis for recruiting U.S. workers to fill the employer's openings through an intrastate clearance system. Once the employer submits the labor certification application and job order to ETA and ETA determines that they are complete and comply with applicable requirements, the agency authorizes access to the interstate clearance system and posts the job order on its electronic job registry. ETA also will direct the employer to conduct recruitment by such means as placing newspaper advertisements and contacting former U.S. workers.

H-2A employers must offer and provide required wages and benefits to H-2A workers and workers in *corresponding employment*.[23] H-2A employers are required to pay workers the highest of several wage rates (see "Wages" below). Employers must provide a *three-fourths guarantee*; that is, they must guarantee to offer workers employment for at least three-fourths of the contract period. They must also provide workers with housing, transportation, and other benefits, including workers' compensation insurance.[24]

ETA, which is responsible for enforcing H-2A employer compliance with obligations related to the labor certification process, may conduct audits of approved labor certification applications. Under certain circumstances, it may revoke an approved certification or debar an employer from receiving future certifications.

DOL regulations on the H-2A visa also include regulations by the Wage and Hour Division (WHD) concerning enforcement of contractual obligations under the H-2A program.[25] WHD is responsible for enforcing H-2A employer compliance with obligations to H-2A workers and workers in corresponding employment, such as the requirement to offer employment to U.S. workers. The agency is responsible for carrying out investigations, inspections, and law enforcement functions and in appropriate instances, imposing penalties or taking other actions, including debarment.

Herding and Range Livestock Regulations

ETA issued separate regulations in 2015 on herding and range livestock production that established special standards and procedures for employers applying for labor certification to hire H-2A workers to perform this type of work. These standards and procedures encompass various

[22] A state workforce agency is a state government agency that receives funds pursuant to the Wagner-Peyser Act (29 U.S.C. §49 et seq.) to administer the state's public labor exchange activities.

[23] Corresponding employment is defined in regulation as the employment of non-H-2A workers by an employer who has an approved H-2A labor certification in any work included in the job order or in any agricultural work performed by the H-2A workers.

[24] H-2A workers, like nonimmigrants generally, are not eligible for federally funded public assistance, with the exception of certain emergency services. See CRS Report RL33809, *Noncitizen Eligibility for Federal Public Assistance: Policy Overview*. However, nonimmigrants are generally subject to the provisions of the Affordable Care Act (P.L. 111-148), as amended. See CRS Report R43561, *Treatment of Noncitizens Under the Affordable Care Act*.

[25] 29 C.F.R. Part 501.

aspects of the labor certification process, including job order and labor certification application filing, U.S. worker recruitment, wage requirements, and housing standards.[26]

H-2B Nonagricultural Worker Visa

The H-2B visa provides for the temporary admission of foreign workers to the United States to perform temporary nonagricultural service or labor, if unemployed U.S. workers cannot be found. Foreign medical graduates coming to perform medical services are explicitly excluded.

H-2B workers are largely low skilled, but the H-2B program is not limited to workers of a particular skill level, and over the years the H-2B visa has been used to bring in a variety of workers. According to DOL labor certification data, the top H-2B occupation in recent years in terms of the number of positions certified has been landscaping and groundskeeping worker. Other top occupations include forest and conservation worker, amusement and recreation attendant, and maid and housekeeping cleaner (see **Appendix B** for data on H-2B labor certifications by occupation).

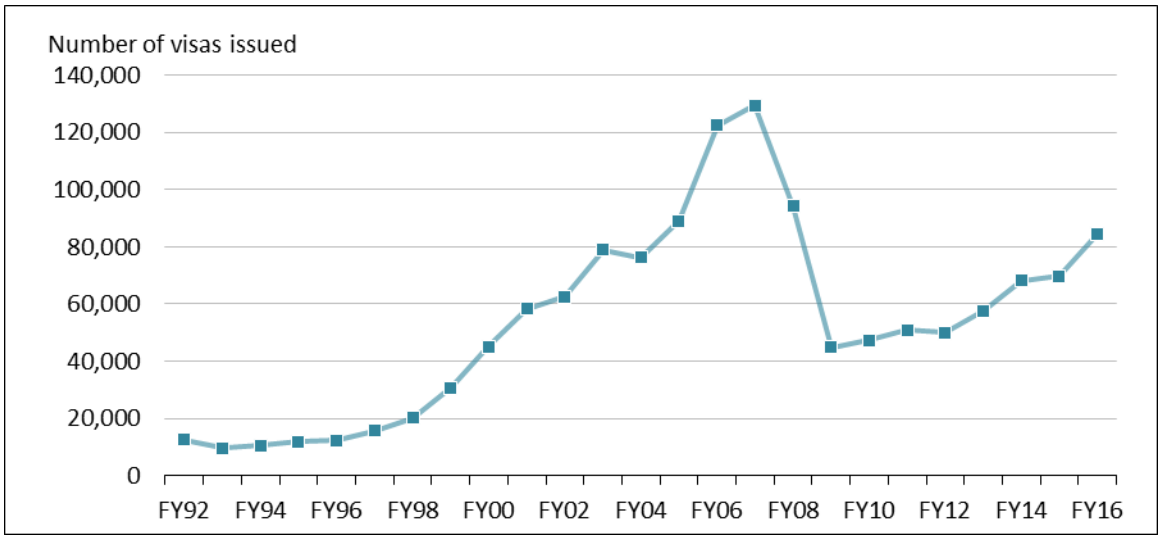
Visa Issuances

Figure 3 shows H-2B visa issuances.[27] Unlike the uncapped H-2A visa, the H-2B visa is subject to a statutory annual numerical limit of 66,000. For certain years, however, a provision was in effect that exempted certain H-2B workers from being counted against the statutory cap (see "H-2B Statutory Provisions" below). H-2B visa issuances peaked in one of these years (FY2007), totaling almost twice the statutory cap. The number of H-2B visas issued reached a recent low point in FY2009, the first year since FY2002 that H-2B visa issuances fell below the 66,000 cap. As shown in **Figure 3**, H-2B visa issuances have followed a generally upward trend since then. (For further information about the H-2B statutory cap and how it is implemented, see "Numerical Limits" below.)

[26] For further information on these regulations, see U.S. Department of Labor, Employer and Training Administration, Office of Foreign Labor Certification, "2015 Final Rule, Range Herding or Production of Livestock in the United States," factsheet, https://www.foreignlaborcert.doleta.gov/herd_pdf/herder_factsheet.pdf.

[27] There is no precise measure available of the number of aliens granted H-2B status in any given year. Visa data provide an approximation but are subject to limitations, including that not all aliens who are issued visas necessarily use them to enter the United States.

Figure 3. H-2B Visas Issued, FY1992-FY2016



Source: CRS presentation of data from U.S. Department of State, Bureau of Consular Affairs.

Notes: In FY2005-FY2007 and FY2016, certain returning H-2B workers were exempt from the statutory cap on the H-2B visa. See **Appendix C** for underlying data.

H-2B Statutory Provisions

The INA does not prescribe a set of conditions and rules for the H-2B visa as it does for the H-2A visa. It does, however, place some specific requirements on H-2B employers. It requires an employer who dismisses an H-2B worker before the end of his or her period of authorized admission to pay for the worker's return transportation abroad.[28] It also directs DHS to impose a fraud prevention and detection fee on H-2B employers.[29] The INA further authorizes DHS to enforce the conditions of an H-2B petition and allows DHS to delegate this authority to DOL, by agreement.[30] (DHS transferred this enforcement authority to DOL, effective January 18, 2009.)[31]

The INA also imposes the aforementioned statutory numerical limit on the H-2B visa, specifying that the total number of aliens who may be issued H-2B visas or otherwise provided H-2B status during a fiscal year may not exceed 66,000. It further specifies that no more than half this total (33,000) may be allocated during the first half of a fiscal year.[32] In addition, in FY2005, FY2006, FY2007, and FY2016, a temporary statutory provision was in effect that exempted certain

[28] INA §214(c)(5); 8 U.S.C. §1184(c)(5).

[29] INA §214(c)(13); 8 U.S.C. §1184(c)(13). H-2B fraud prevention and detection fees are deposited into the Fraud Prevention and Detection Account, which was established in the general fund of the Treasury by INA §286(v), 8 U.S.C. §1356(v). This account supports activities related to preventing and detecting fraud in the delivery of immigration benefits.

[30] INA §214(c)(14)(A), (B); 8 U.S.C. §1184(c)(14)(A), (B).

[31] See U.S. Department of Labor, Employment and Training Administration and Wage and Hour Division, "Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes," 73 *Federal Register* 78020, 78046, December 19, 2008 (hereinafter cited as 2008 DOL H-2B rule); U.S. Department of Homeland Security and U.S. Department of Labor, Employment and Training Administration and Wage and Hour Division, "Temporary Non-Agricultural Employment of H–2B Aliens in the United States," 80 *Federal Register* 24041, 24131, April 29, 2015 (hereinafter cited as 2015 DHS/DOL interim final H-2B rule).

[32] INA §§214(g)(1)(B), (g)(10); 8 U.S.C. §§1184(g)(1)((B), (g)(10).

returning H-2B workers from the cap. It applied to returning H-2B workers who had been counted against the cap in any one of the three prior fiscal years.[33] For FY2017, language in the Consolidated Appropriations Act, 2017 (P.L. 115-31) provides for the issuance of H-2B visas beyond the statutory cap under certain conditions (see "Legislative Activity").

H-2B Regulations

Regulations issued by DHS and DOL implement the INA provisions on the H-2B visa (see **Appendix D** for background information on selected H-2B regulations).

DHS Regulations on the H-2B Visa

DHS regulations govern the admission of H-2B workers to the United States.[34] They define "temporary" work for purposes of the H-2B visa. In order for work to qualify as temporary, the employer must establish that his or her need for the worker will end in the "near, definable future." Additionally, the employer's need for the duties to be performed by the worker must be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need.[35] The employer's need must generally be for a period of one year or less, but, in the case of a one-time occurrence, could last up to three years.

An H-2B worker can be admitted to the United States up to 10 days before the validity period of the H-2B petition and may remain in the country for 10 days after the petition expires. An employer can apply to extend an H-2B worker's stay in increments of up to one year, but an alien's total period of stay as an H-2B worker may not exceed three consecutive years.[36] An H-2B alien who has spent three years in the United States may not seek an extension of stay or be readmitted to the United States as an H-2B worker until he or she has been outside the country for three months.

DHS's H-2B regulations limit participation in the H-2B program to nationals of countries designated annually by DHS, with the concurrence of DOS.[37] These regulations also prohibit payments by prospective H-2B workers to employers, recruiters, or other employment service providers where the payments are a condition of obtaining H-2B employment.

As noted in this report's discussion of the H-2B statutory provisions, DHS has transferred H-2B enforcement authority to DOL. In accordance with this transfer, DHS regulations provide that:

[33] The FY2016 returning worker exemption was enacted in P.L. 114-113, Div. F, Title V, §565.

[34] 8 C.F.R. §214.2(h)(6). DHS regulations on the H-2B visa require that an employer have an approved labor certification before the employer can submit a petition for H-2B workers. Previously, an employer whose H-2B labor certification application was denied by DOL could submit an H-2B petition to DHS containing countervailing evidence.

[35] For definitions of these types of need, see 8 C.F.R. §214.2(h)(6)(ii)(B).

[36] Included in this three-year period is any time an H-2B alien spent in the United States under the "H" (temporary worker) or "L" (temporary intracompany transferee) visa categories.

[37] On October 26, 2016, DHS published a notice, effective on January 18, 2017, for one year, identifying 84 countries whose nationals are eligible to participate in the H-2B program. See U.S. Department of Homeland Security, "Identification of Foreign Countries Whose Nationals Are Eligible to Participate in the H-2A and H-2B Nonimmigrant Worker Programs," 81 *Federal Register* 74468, October 26, 2016. The notice discusses the factors considered in designating eligible countries.

> The Secretary of Labor may investigate employers to enforce compliance with the conditions of a petition and Department of Labor-approved temporary labor certification to admit or otherwise provide status to an H-2B worker.[38]

DHS/DOL Regulations on H-2B Employment

ETA regulations on H-2B labor certification establish a two-part labor certification process with distinct *registration* and *application* phases.[39] In the registration phase, DOL must assess an employer's temporary need for H-2B workers. A prospective H-2B employer is required to submit an H-2B registration 120 days to 150 days before the initial date of need for workers and must receive registration approval before filing a labor certification application. A registration approval can be valid for up to three years. (As of the date of this report, the registration process is not operational; DOL continues to make determinations about temporary need when it processes labor certification applications.)

Regarding the employer's period of need for workers, the regulations provide that except in cases of a one-time occurrence, labor certification applications with a period of employer need of more than nine months will generally be denied. According to DHS and DOL:

> We conclude that a maximum employment period of 9 months establishes the temporariness of the position.... Recurring temporary needs of more than 9 months are, as a practical matter, permanent positions for which H–2B labor certification is not appropriate.[40]

The regulations also limit participation of job contractors in the H-2B program to cases in which they can demonstrate their own temporary need for workers, not that of their employer-clients.[41]

The registration phase is followed by the employer application phase. During the application phase, ETA determines whether U.S. workers are available to fill the labor needs of the employer. Between 75 and 90 days before the employer's date of need for workers, a prospective H-2B employer must concurrently submit a labor certification application to ETA and a job order to the SWA serving the area of intended employment. If ETA determines that the submissions are complete and comply with applicable requirements, it will direct the SWA to place the job order into intrastate and interstate clearance and will post the job order on its electronic job registry to recruit U.S. workers. ETA will also direct the employer to conduct recruitment of U.S. workers, including by placing newspaper advertisements and contacting former U.S. workers. The employer must continue to accept referrals and applications of U.S. applicants until 21 days before the date of need.

Employers must offer and provide required wages and benefits to H-2B workers and workers engaged in *corresponding employment.*[42] They are required to pay workers the highest of the prevailing wage rate or the federal, state, or local minimum wage. They must offer a *three-fourths*

---

[38] 8 C.F.R. §214.2(h)(6)(ix).

[39] 20 C.F.R. Part 655, Subpart A.

[40] 2015 DHS/DOL interim final H-2B rule, p. 24056. The supplementary information accompanying the rule also includes the following further explanation: "DOL's temporary need period [of nine months] falls comfortably within the parameters of the general ''one year or less'' limitation contained in the DHS regulations." p. 24056.

[41] This restriction reflects a concern that job contractors often have an ongoing, permanent need for workers rather than a temporary need, as statutorily required for the H-2B visa.

[42] Corresponding employment is defined to include, with some exceptions, employment of non-H-2B workers performing substantially the same work included in the job order or substantially the same work performed by H-2B workers.

guarantee (similar to that under the H-2A program) that ensures payment of wages for at least three-fourths of the contract period.[43] Among other benefits, they must pay or reimburse workers for transportation costs (beyond the statutory requirements concerning early dismissal of workers) and visa costs, and they must provide workers with workers' compensation insurance.[44]

As under the H-2A visa program, ETA enforces H-2B employer compliance with obligations related to the labor certification process. It may conduct audits of adjudicated labor certification applications. Under certain circumstances, it may revoke an approved certification or debar an employer from receiving future certifications.

The Wage and Hour Division (WHD) also has enforcement responsibility under the H-2B visa program that is detailed in regulations.[45] It enforces the rights of H-2B workers and workers in corresponding employment and the employer's obligations to H-2B and U.S. workers, such as whether employment was offered to U.S. workers. WHD is responsible for carrying out investigations, inspections, and law enforcement functions as well as, in appropriate instances, imposing penalties or taking other actions, including debarment.

Legislative Activity

Since the 1990s, a variety of legislative proposals have been put forward concerning guest workers. Some proposals would reform existing programs, while others would establish new guest worker programs for agricultural and nonagricultural workers. Over the years, some proposals have been introduced in Congress as stand-alone bills, while others have been part of larger comprehensive immigration reform measures.

Major guest worker reform legislation was last considered in the 113th Congress. During that Congress, the Senate passed a comprehensive immigration reform bill that would have established new temporary agricultural and nonagricultural worker visas, reformed the H-2B visa, and phased out the H-2A visa.[46] In addition, the House Judiciary Committee reported a bill in the 113th Congress to establish a new agricultural worker visa to replace the H-2A visa.[47]

More recent guest worker bills have proposed changes to the existing H-2A and H-2B visas. For example, legislation on the H-2A visa introduced in the 114th and 115th Congresses would variously enact statutory provisions concerning, among other requirements, temporary need, U.S. worker recruitment, wages, and housing.[48] A bill on the H-2B visa, as introduced in the 115th Congress, would establish a permanent exemption from the H-2B statutory numerical limit for returning workers and make other changes to H-2B visa requirements.[49]

---

[43] The three-fourths guarantee applies in each 6-week or 12-week or period, depending on the length of the employment period.

[44] H-2B workers, like nonimmigrants generally, are not eligible for federally funded public assistance, with the exception of certain emergency services. See CRS Report RL33809, *Noncitizen Eligibility for Federal Public Assistance: Policy Overview*. However, nonimmigrants are generally subject to the provisions of the Affordable Care Act (P.L. 111-148), as amended. See CRS Report R43561, *Treatment of Noncitizens Under the Affordable Care Act*.

[45] 29 C.F.R. Part 503.

[46] See archived CRS Report R43097, *Comprehensive Immigration Reform in the 113th Congress: Major Provisions in Senate-Passed S. 744*.

[47] See archived CRS Report R43161, *Agricultural Guest Workers: Legislative Activity in the 113th Congress*.

[48] See, for example, H.R. 281 and H.R. 641, as introduced in the 115th Congress.

[49] See S. 792, as introduced in the 115th Congress.

Legislative action on guest worker programs in recent years has focused on the H-2B visa, specifically on the statutory cap and H-2B regulatory provisions. The Consolidated Appropriations Act, 2016 (P.L. 114-113) included an H-2B returning worker provision, providing that a returning H-2B worker who had been counted against the 66,000 cap in FY2013, FY2014, or FY2015 would not be counted again in FY2016.[50] Another H-2B provision in P.L. 114-113 provided employers in the seafood industry who had approved H-2B petitions with additional time (beyond the approved start date) to bring in workers.[51] This provision is also included in the 2015 DHS/DOL interim final rule on H-2B employment.[52] P.L. 114-113 further specified how H-2B prevailing wages were to be determined and required that the DHS regulatory definition of H-2B temporary need (i.e., generally employer need of one year or less) be used for purposes of H-2B admission.[53] In addition, it included other H-2B-related language that prohibited the use of funds in the act to enforce the definitions of corresponding employment and the three-fourths guarantee, or to implement certain DOL enforcement provisions, in the 2015 DHS/DOL interim final rule.[54]

The Consolidated Appropriations Act, 2017 (P.L. 115-31) contains the same provisions as P.L. 114-113 on H-2B employers in the seafood industry, H-2B prevailing wages, H-2B temporary need, and certain definitions in the 2015 DHS/DOL H-2B interim final rule.[55] It, however, contains different language on the H-2B statutory cap. It provides that after consultation with the Secretary of Labor, and upon the determination that the needs of American businesses cannot be satisfied in FY2017 with available U.S. workers, the DHS Secretary may increase the number of aliens who may receive an H-2B visa in FY2017 (above the annual statutory cap) by not more than the highest number of H–2B nonimmigrants who participated in the H–2B returning worker program in any fiscal year in which returning workers were exempt from such numerical limitation.[56] As of the date of this report, DHS and DOL have not indicated how they will implement this language.

Policy Considerations

Guest worker programs generally try to achieve two goals simultaneously: to be responsive to legitimate employer needs for temporary labor and to provide adequate protections for U.S. and foreign temporary workers. DOL explicitly addressed the idea of balancing the needs of employers and workers in the supplementary information accompanying a 2011 proposed rule on the H-2B visa:

[50] P.L. 114-113, Div. F, Title V, §565.

[51] P.L. 114-113, Div. H, Title I, §111.

[52] The seafood industry staggered-entry provision in P.L. 114-113 was also included in the earlier Consolidated and Further Continuing Appropriations Act, 2015 (P.L. 113-235, Div. H, Title I, §108). The 2015 DHS/DOL interim final rule, which was issued between these two enactments, addresses the staggered-entry provision in its supplementary information: "Public Law 113–235, 128 Stat. 2130, 2464, permits staggered entry of H–2B nonimmigrants employed by employers in the seafood industry under certain conditions. The Departments have determined that this legislation constitutes a permanent enactment, and so we have incorporated the requirements into this interim final rule." p. 24060.

[53] P.L. 114-113, Div. H, Title I, §§112, 113.

[54] P.L. 114-113, Div. H, Title I, §§113, 114.

[55] P.L. 115-31, Div. H, Title I, §§111-113.

[56] P.L. 115-31, Div. F, Title V, §543.

> Although the Department still seeks to maintain an efficient system, it has in this new rule struck a balance between reducing processing times and protecting U.S. worker access to these job opportunities.[57]

The balancing of broad guest worker program goals is reflected, in practice, in the particular provisions that H-2A and H-2B proposals include on a range of component policy considerations, such as program administration, the labor market test, and wages, among others.

Program Administration

Under the H-2A and H-2B programs, DOL makes determinations on labor certification applications and DHS adjudicates nonimmigrant visa petitions (see **Figure 1**). Under the INA, as explained, prospective H-2A employers must apply to DOL for labor certification. The INA does not require DOL labor certification for the H-2B visa. Rather, it makes general reference to "consultation with appropriate agencies of the Government" as part of the process of adjudicating petitions for "H" and other specified nonimmigrants.[58] The requirement for H-2B labor certification by DOL is established by regulation. The supplementary information accompanying the current 2015 DHS/DOL interim final rule on H-2B employment includes the following explanation for DOL's labor certification role:

> DOL is the appropriate government agency with expertise in labor questions and historic and specific expertise in addressing labor protection questions related to the H–2B program. This advice helps DHS fulfill its statutory duty to determine, prior to approving an H–2B petition, that unemployed U.S. workers capable of performing the relevant service or labor cannot be found in the United States.[59]

Over the years, regulatory and legislative proposals have sought to establish new agency roles in administering guest worker programs. For example, H-2B rules proposed in 2005 by DHS and DOL would have eliminated DOL's labor certification role in the interest of efficiency. Under this proposal, which was ultimately withdrawn in the face of opposition, employers would have applied directly to DHS for H-2B workers and would have included certain labor attestations with their applications.[60]

Legislation introduced in recent Congresses to reform the H-2A visa has proposed to amend the INA to require prospective H-2A employers to submit labor certification applications to the Secretary of Agriculture, rather than the Secretary of Labor.[61] Bills to establish new guest worker programs have similarly proposed to eliminate or diminish DOL's role and to assign key administrative responsibilities to the Secretary of Agriculture.[62]

---

[57] U.S. Department of Labor, Employment and Training Administration and Wage and Hour Division, "Temporary Non-Agricultural Employment of H–2B Aliens in the United States," 76 *Federal Register* 15129, 15133, March 18, 2011 (hereinafter cited as 2011 DOL proposed H-2B rule) (see **Appendix D**).

[58] INA §214(c)(1); 8 U.S.C. §1184(c)(1).

[59] 2015 DHS/DOL interim final H-2B rule, p. 24045.

[60] See U.S. Department of Homeland Security, "Petitions for Aliens To Perform Temporary Nonagricultural Services or Labor (H–2B)," 70 *Federal Register* 3984, January 27, 2005; U.S. Department of Labor, Employment and Training Administration and Wage and Hour Division, "Post-Adjudication Audits of H-2B Petitions in All Occupations Other Than Excepted Occupations in the United States," 70 *Federal Register* 3993, January 27, 2005. Under this proposal, DOL would have conducted post-certification audits.

[61] See, for example, H.R. 281 and H.R. 641, as introduced in the 115th Congress.

[62] See, for example, H.R. 1773, as reported by the House Judiciary Committee, and S. 744, as passed by the Senate, in the 113th Congress.

Labor Market Test

Fundamental questions about any guest worker program include if and how it tests the labor market to determine whether U.S. workers are available for the job opportunities in question. Under both the H-2A and H-2B programs, employers interested in hiring foreign workers must first go through the process of labor certification. Intended to protect job opportunities for U.S. workers, labor certification entails a determination by DOL of whether qualified U.S. workers are available to perform the needed work and whether the hiring of foreign workers will adversely affect the wages and working conditions of similarly employed U.S. workers. Recruitment is the primary method used to determine U.S. worker availability. While there is widespread agreement on the goals of labor certification, the process itself has been criticized for being cumbersome, slow, expensive, and ineffective in protecting U.S. workers.

The nature of the labor market test was a main difference between the DOL H-2A and H-2B rules issued by the Bush Administration in 2008 and the rules issued by the Obama Administration in 2010 and 2015, which are now in effect. The 2008 DOL rules for both programs changed the traditionally supervised labor certification process into an attestation-based certification process (see **Appendix D**). In the supplementary information accompanying its 2008 proposed H-2A rule, DOL cited criticism of the labor certification process as "complicated, time-consuming, and requiring the considerable expenditure of resources by employers." It further stated that its proposals "to re-engineer the H–2A program processing" will "simplify the process by which employers obtain a labor certification while maintaining, and even enhancing, the Department's substantial role in ensuring that U.S. workers have access to agricultural job opportunities."[63]

Current regulations on H-2A and H-2B employment return to a supervised, certification-based model of labor certification (see "DOL Regulations on H-2A Employment" and "DHS/DOL Regulations on H-2B Employment" above). A key argument made in support of this change concerned the need to restore protections for U.S. and foreign workers. For example, a 2011 DOL proposed H-2B rule stated:

> [T]here are insufficient worker protections in the current attestation-based model in which employers merely assert, and do not demonstrate, that they have performed an adequate test of the U.S. labor market and one which is in accordance with the regulations.[64]

Legislative guest worker proposals, however, continue to incorporate various forms of labor attestation. In some cases, they seek to replace existing labor certification requirements with labor attestation requirements, while generally retaining the current two-stage process in which employers first test the labor market and then, after receiving certification, petition for guest workers.[65] Other measures represent a greater departure from the current system in proposing to eliminate the current labor certification application step and to incorporate labor attestation requirements into the process of petitioning for guest workers.[66]

---

[63] U.S. Department of Labor, Employment and Training Administration and Wage and Hour Division, "Temporary Agricultural Employment of H–2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement," 73 *Federal Register* 8538, 8542, February 18, 2008.

[64] 2011 DOL proposed H-2B rule, p. 15132 (see **Appendix D**).

[65] See, for example, H.R. 281, as introduced in the 115th Congress.

[66] See, for example, S. 792, as introduced in the 115th Congress. For another approach, see H.R. 2895, as introduced in the 112th Congress.

Wages

To prevent adverse effects on similarly employed U.S. workers, the H-2A and H-2B programs require employers to offer wages at or above a specified level. Under the H-2A program, employers must pay their workers the highest of the federal or applicable state minimum wage rate, the applicable prevailing wage rate,[67] the adverse effect wage rate (AEWR),[68] or the agreed-upon collective bargaining wage rate. Under the H-2B program, employers must pay their workers the highest of the federal, state, or local minimum wage or the prevailing wage rate.

Wage requirements have been a key area of controversy about the H-2A and H-2B programs. The 2015 DHS/DOL interim final rule on H-2B wages was issued following years of court challenges and congressional objections to earlier regulations.[69]

Policy differences about H-2A wage requirements center on the AEWR; the H-2A visa is the only nonimmigrant visa subject to it.[70] Farm labor advocates have argued that the AEWR is necessary to protect U.S. agricultural workers from a possible depression of wages resulting from the hiring of foreign workers. Employers have long maintained that the AEWR, as traditionally calculated using USDA's Farm Labor Survey data, results in inflated wage rates. Legislative proposals over the years to reform the H-2A program or establish new agricultural guest worker programs have often included provisions to eliminate the use of the AEWR or effectively redefine it.

Temporary or Seasonal Nature of Work

The H-2A and H-2B programs are, by definition, limited to temporary or seasonal work.[71] They are intended to meet employers' temporary—and not permanent—needs for labor when U.S. workers cannot be found.

This "temporary or seasonal" requirement places restrictions on both programs. With respect to the H-2A program, it means that the program cannot be used to meet employers' year-round agricultural labor needs absent a statutory provision. There are some long-standing exceptions to this year-round restriction, such as for sheepherding on the open range.[72] Legislation in recent

---

[67] In general, the prevailing wage rate is the average wage paid to similarly employed workers in an occupation in an area of intended employment.

[68] The AEWR is equal to the annual weighted average hourly wage for field and livestock workers combined in a state or region, as published annually by the U.S. Department of Agriculture.

[69] U.S. Department of Homeland Security and U.S. Department of Labor, Employment and Training Administration and Wage and Hour Division, "Wage Methodology for the Temporary Non-Agricultural Employment H–2B Program," 80 *Federal Register* 24145, April 29, 2015 (hereinafter cited as 2015 DHS/DOL final H-2B wage rule). For a discussion of the controversy surrounding this rule, see pp. 24146-24154.

[70] For 2017, the AEWR ranges from $10.38 for Arkansas, Louisiana, and Mississippi to $13.79 for Kansas, Nebraska, North Dakota, and South Dakota. 2017 AEWRs for all states are available in U.S. Department of Labor, Employment and Training Administration, "Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States: 2017 Adverse Effect Wage Rates," 81 *Federal Register* 94422, December 23, 2016.

[71] The INA definition of the H-2A nonimmigrant category generally requires the agricultural work to be "of a temporary or seasonal nature" (INA §101(a)(15)(H)(ii)(a); 8 U.S.C. §1101(a)(15)(H)(ii)(a)), and the INA definition of the H-2B nonimmigrant category requires the performance of nonagricultural "temporary service or labor" (INA §101(a)(15)(H)(ii)(b); 8 U.S.C. §1101(a)(15)(H)(ii)(b)). In the case of both the H-2A and H-2B visas, this temporary nature-of-the-work requirement is separate from and in addition to the requirement that workers must be coming for a temporary period of time.

[72] Herding activities are not mentioned in the INA definition of the H-2A nonimmigrant category. However, according to DOL, the inclusion of herding, specifically sheepherding, in the H-2A program has a statutory basis: "Sheepherders … owe their inclusion in the program to a statutory provision dating back to the 1950s. That legislative inclusion was

Congresses has sought to include dairy industry activities—most of which are excluded from the H-2A program as being year-round—in the H-2A program by amending the INA definition of the H-2A visa.[73] Other legislative proposals would more broadly amend the statutory definition of the H-2A visa to eliminate the requirement that H-2A nonimmigrants perform work "of a temporary or seasonal nature."[74]

Under the H-2B program, as described, the employer's need for the duties to be performed by the worker must be a one-time occurrence, seasonal need, peakload need, or intermittent need. Some proposals in past Congresses would have broadened the H-2B visa from a category restricted to temporary need to one covering "short-term" labor.[75] This change, which was not enacted, would have permitted H-2B workers to fill a wider range of job openings.

Numerical Limits

A numerical cap provides a means, separate from program requirements, of limiting the number of foreign workers who can be admitted annually in a visa category. The H-2A visa is not numerically limited. The H-2B program, by contrast, is statutorily capped at 66,000 annually. Certain H-2B petitions are exempt from the cap, such as petitions filed for current H-2B workers who are seeking an extension of stay, a change of employer, or a change in the terms of employment.

Annual numerical limitations on the H-2B visa and other capped temporary worker visas are implemented by DHS at the petition stage. Under DHS regulations:

> When calculating the numerical limitations ... for a given fiscal year, USCIS will make numbers available to petitions in the order in which the petitions are filed. USCIS will make projections of the number of petitions necessary to achieve the numerical limit of approvals, taking into account historical data related to approvals, denials, revocations, and other relevant factors. USCIS will monitor the number of petitions (including the number of beneficiaries requested when necessary) received and will notify the public of the date that USCIS has received the necessary number of petitions (the "final receipt date").[76]

In other words, in a given fiscal year USCIS accepts the number of petitions it estimates will result in the appropriate number of foreign workers receiving a visa or otherwise obtaining status under a particular temporary worker visa program. USCIS has described the inherent challenges in this system in connection with the H-2B visa:

> It can be difficult to estimate in advance how many beneficiaries of an H-2B petition approved by USCIS will actually seek H-2B status or eventually be issued an H-2B visa by the Department of State (DOS).[77]

---

implicitly ratified in [the Immigration Reform and Control Act of 1986]." See U.S. Department of Labor, Employment and Training Administration and Wage and Hour Division, "Temporary Agricultural Employment of H-2A Aliens in the United States," 75 *Federal Register* 6884, 6891, February 12, 2010 (hereinafter cited as 2010 DOL H-2A rule). For many years, DOL sub-regulatory guidance (special procedures) governed the labor certification process for occupations in sheep and goat herding and range production of livestock. In 2015, DOL published a final rule to establish a single set of regulations for H-2A employment in these occupations (see "Herding and Range Livestock Regulations" above).

[73] See, for example, H.R. 281, as introduced in the 115th Congress.

[74] See, for example, H.R. 641, as introduced in the 115th Congress.

[75] See, for example, S. 1918, as introduced in the 109th Congress.

[76] 8 C.F.R. §214.2((h)(8)(ii)(B).

[77] U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, "USCIS to Reopen H-2B Cap for the Second Half of Fiscal Year 2015," June 5, 2015, https://www.uscis.gov/news/alerts/uscis-reopen-h-2b-cap-

In some years, USCIS has accepted more petitions than necessary and the H-2B cap has been exceeded. In at least one year (FY2015), however, USCIS initially accepted too few petitions and had to briefly reopen the window for accepting cap-subject H-2B petitions.[78]

In years when the demand for H-2B visas exceeds the supply, there is always pressure to admit additional H-2B workers. In some years, a temporary statutory provision has been enacted to exempt certain H-2B returning workers from the cap (see "H-2B Statutory Provisions" above). This approach allows for the admission of increased numbers of H-2B workers, while leaving the annual 66,000 statutory limit in place. The most recent "H-2B returning worker" exemption expired at the end of FY2016.

Treatment of Family Members

The INA allows for the admission to the United States of the spouses and minor children of foreign workers on H-2A, H-2B, and other "H" visas who are accompanying or following to join the worker. These family members are issued H-4 visas and do not count against the numerical cap, if any, on the relevant temporary worker visa (such as the H-2B visa). Making provision for the admission of guest workers' spouses and minor children enables families to stay together. On the other hand, this practice has been faulted for decreasing incentives for guest workers to return home after their authorized period of stay. Some past legislative proposals to establish new guest worker programs would have explicitly prohibited family members from accompanying or following to join principal aliens.

Enforcement

Another set of considerations relates to enforcement of the terms of guest worker programs. With respect to the H-2A program, the INA broadly authorizes the Secretary of Labor to

> take such actions, including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be necessary to assure employer compliance with terms and conditions of employment.[79]

More limited language added to the INA in 2005 applies to the H-2B program. These provisions authorize the Secretary of Homeland Security to impose administrative remedies and to deny certain petitions filed by an employer if the Secretary finds "a substantial failure to meet any of the conditions of the [H-2B] petition" or "a willful misrepresentation of a material fact in such petition."[80] As discussed, the Secretary of Homeland Security has delegated this enforcement authority to the Secretary of Labor in accordance with an agreement between the two agencies. The Secretary of Labor subsequently delegated this authority to WHD, which is now responsible for assuring employer compliance with the terms and conditions of H-2B employment.[81]

Another enforcement-related question concerns what type of mechanism, if any, ensures that guest workers do not remain in the United States beyond their authorized period of stay and become part of the unauthorized population. Among the related regulatory provisions currently in

second-half-fiscal-year-2015.

[78] See ibid.

[79] INA §218(g)(2); 8 U.S.C. §1188(g)(2).

[80] INA §214(c)(14)(A); 8 U.S.C. §1184(c)(14)(A).

[81] U.S. Department of Labor, Office of the Secretary, Secretary's Order 01–2014, 79 *Federal Register* 77527, December 24, 2014.

effect are provisions establishing notification requirements for H-2A and H-2B employers. DHS regulations on the H-2A visa and the H-2B visa require petitioners to notify DHS within two work days when an H-2A or H-2B worker fails to report at the start of the employment period, absconds[82] from the worksite, or is terminated prior to completion of the work, or when the work for which H-2A or H-2B workers were hired is completed early.[83] DHS explained the purpose of these notification requirements as enabling the agency

> to keep track of H–2B workers while they are in the United States and take appropriate enforcement action where DHS determines that the H–2B workers have violated the terms and conditions of their nonimmigrant stay.[84]

Other suggestions that have been offered to help ensure that temporary workers depart at the end of their authorized period of stay include involving the workers' home countries in guest worker programs. Another idea is to create an incentive for foreign workers to leave the United States at the appropriate time by, for example, withholding earnings or otherwise setting aside a sum of money for each worker that would only become available once the worker returned home.[85]

Unauthorized Workers

The H-2A and H-2B visa programs account for only a small portion of all the foreign nationals in the United States performing the type of agricultural and nonagricultural work covered by these visas. Unauthorized workers comprise a sizeable percentage of workers in some industries and occupations. The Pew Research Center estimates, for example, that in 2014 unauthorized workers held 26% of farming jobs and 15% of construction jobs.[86] Some have advocated for shifting the unauthorized inflow of foreign workers into legal channels, citing economic benefits.[87] Others have argued that unauthorized workers and legal guest workers compete with less-educated U.S. workers for jobs.[88]

More direct questions about legalization of unauthorized workers in the United States also arise in connection with guest worker programs. Historically, these discussions have focused on agricultural workers, and in some past Congresses, agricultural guest worker reform provisions have been paired with agricultural worker legalization provisions in legislative proposals. For example, along with its agricultural guest worker provisions, the comprehensive immigration reform bill passed by the Senate in 2013 proposed a two-stage agricultural worker legalization program, through which farm workers who had performed a requisite amount of agricultural work and satisfied other requirements could have obtained legal temporary resident status. After

---

[82] *Absconding* is defined as not reporting for work for five consecutive work days without the employer's consent. 8 C.F.R. §§214.2(h)(5)(vi)(E), (h)(6)(i)(F)(2).

[83] 8 C.F.R. §§214.2(h)(5)(vi)(B)(1), (h)(6)(i)(F)(1).

[84] U.S. Department of Homeland Security, "Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers," 73 *Federal Register* 78104, 78116, December 19, 2008 (hereinafter cited as 2008 DHS H-2B rule).

[85] See, for example, H.R. 2895, as introduced in 112th Congress.

[86] Jeffrey S. Passel and D'Vera Cohn, *Size of U.S. Unauthorized Immigrant Workforce Stable After the Great Recession*, Pew Research Center, November 2016, p. 8. The report estimates that in 2014 there were 8 million unauthorized aliens in the civilian labor force, representing 5% of the total.

[87] See, for example, Gordon H. Hanson, *The Economics and Policy of Illegal Immigration in the United States*, Migration Policy Institute, December 2009.

[88] See, for example, Steven A. Camarota, "Unskilled Workers Lose Out to Immigrants," nytimes.com, January 6, 2015; and testimony of Steven A. Camarota, Center for Immigration Studies, at U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Immigration and the National Interest, *The H-2B Temporary Foreign Worker Program: Examining the Effects on Americans' Job Opportunities and Wages*, hearing, 114th Congress, 2nd sess., June 8, 2016.

meeting additional agricultural work and other requirements, these workers could have applied for lawful permanent resident (LPR) status. (Unauthorized workers and H-2A workers would have been eligible for this program.)[89]

Conclusion

Many policymakers assert that the H-2A and H-2B visa programs are not adequately meeting employers' labor needs and/or are not adequately protecting U.S. and foreign workers, although their particular criticisms vary widely. In past years, proposed solutions have taken the form of reforms to the H-2A and H-2B visas as well as new guest worker visa programs. In the current climate, pursuing reforms to existing visa programs seems to be the course more policymakers are likely to follow.

[89] Sections 2211-2212 of S. 744, as passed by the Senate in the 113th Congress. For further information about this proposal and other proposals, see archived CRS Report R43161, *Agricultural Guest Workers: Legislative Activity in the 113th Congress*.

Appendix A. DOL H-2A and H-2B Labor Certifications by State

Table A-1. Top 10 States Granted H-2A Labor Certifications: FY2014 and FY2015

Rankings based on number of positions certified

	FY2014		FY2015	
Ranking	**State**	**Positions Certified**	**State**	**Positions Certified**
1	North Carolina	15,135	Florida	17,942
2	Florida	13,544	North Carolina	17,696
3	Georgia	10,387	Georgia	14,393
4	Washington	9,064	Washington	11,844
5	Louisiana	7,218	California	8,591
6	Kentucky	6,753	Louisiana	7,787
7	California	6,043	Kentucky	6,722
8	New York	4,680	New York	5,039
9	Arizona	3,751	Arizona	3,763
10	Virginia	3,214	South Carolina	3,594
	Total, All States	**116,689**	**Total, All States**	**139,832**

Source: CRS presentation of data from U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, *Annual Report 2014* and *Annual Report 2015*.

Table A-2. Top 10 States Granted H-2B Labor Certifications: FY2014 and FY2015

Rankings based on number of positions certified

	FY2014		FY2015	
Ranking	**State**	**Positions Certified**	**State**	**Positions Certified**
1	Texas	14,517	Texas	15,075
2	Florida	6,512	Florida	6,847
3	Louisiana	4,888	Colorado	4,861
4	Maryland	3,828	Louisiana	4,660
5	Pennsylvania	3,722	Maryland	4,586
6	Colorado	3,701	Pennsylvania	4,309
7	Virginia	3,417	Virginia	3,484
8	North Carolina	3,245	North Carolina	3,412
9	New York	3,218	New York	3,263
10	Massachusetts	2,798	Arkansas	2,810
	Total, All States	**93,649**	**Total, All States**	**101,765**

Source: CRS presentation of data from U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, *Annual Report 2015*.

Appendix B. DOL H-2B Labor Certifications by Occupation

In FY2015, DOL approved 5,112 H-2B labor certification applications. For these applications, DOL approved requests for a total of 101,765 H-2B positions.

Typically, a majority of H-2B requests certified by DOL are for workers in a few occupations. In FY2015, as shown in **Table B-1**, more than half the certified positions were in three occupations, and 76% of certified positions were in 10 occupations. One occupation, landscaping & groundskeeping worker, accounted for 41% of the total number of H-2B positions certified.

Table B-1. Number of Certified H-2B Positions by Occupation, FY2015

Ranking	Occupation	Number of Workers Certified	Percentage of Total Workers Certified	Cumulative Percentage
1	Landscaping & groundskeeping worker	42,104	41.4%	41.4%
2	Forest & conservation worker	8,409	8.3%	49.6%
3	Amusement & recreation attendant	6,906	6.8%	56.4%
4	Maids & housekeeping cleaner	6,667	6.6%	63.0%
5	Construction laborer	3,619	3.6%	66.5%
6	Meat, poultry & fish cutter and trimmer	2,822	2.8%	69.3%
7	Waiter & waitress	2,062	2.0%	71.3%
8	Packer and packager, hand	1,659	1.6%	73.0%
9	Cook, restaurant	1,539	1.5%	74.5%
10	Nonfarm animal caretaker	1,513	1.5%	76.0%
	Other	24,465	24.0%	100.0%
	Total	**101,765**	**100.0%**	

Source: U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, *Annual Report 2015*.

Appendix C. H-2A and H-2B Visa Issuances

Table C-1. Number of H-2A and H-2B Visas Issued, FY1992-FY2016

Fiscal Year	H-2A Visas Issued	H-2B Visas Issued
1992	6,445	12,552
1993	7,243	9,691
1994	7,721	10,400
1995	8,379	11,737
1996	11,004	12,200
1997	16,011	15,706
1998	22,676	20,192
1999	28,568	30,642
2000	30,201	45,037
2001	31,523	58,215
2002	31,538	62,591
2003	29,882	78,955
2004	31,774	76,169
2005	31,892	89,135
2006	37,149	122,541
2007	50,791	129,547
2008	64,404	94,304
2009	60,112	44,847
2010	55,921	47,403
2011	55,384	50,826
2012	65,345	50,009
2013	74,192	57,600
2014	89,274	68,102
2015	108,144	69,684
2016	134,368	84,627

Source: CRS presentation of data from U.S. Department of State, Bureau of Consular Affairs.

Appendix D. Background Information on H-2A and H-2B Regulations

H-2A Rules

The H-2A visa program is governed by a DHS final rule issued in 2008 and a DOL final rule issued in 2010.[90] A separate DOL final rule issued in 2015 applies to H-2A employment in the herding or production of livestock on the range.[91]

Background

In 2008, during the George W. Bush Administration, DHS and DOL published final rules to significantly amend their respective H-2A regulations.[92] The agencies issued these rules to streamline the H-2A program in the aftermath of unsuccessful congressional efforts to enact comprehensive immigration reform legislation with guest worker provisions.

The DOL rule was controversial. Prior to its issuance, the labor certification process had been a fully supervised certification-based process, in which federal or state officials reviewed an employer's actual efforts or documentation to ensure compliance with program requirements. The 2008 rule replaced this supervised process with an attestation-based process, in which prospective H-2A employers had to attest in their applications, under threat of penalties, that they complied with H-2A program requirements.

Under the Obama Administration, the 2008 DHS rule was retained, but the 2008 DOL rule was replaced with a new H-2A final rule issued in 2010. In the supplementary information accompanying the proposed version of this replacement rule, DOL cited concerns about employer noncompliance with program requirements under the 2008 rule. It explained the need for new rulemaking, in part, as follows:

> The Department, upon due consideration, believes that the policy underpinnings of the 2008 Final Rule, e.g. streamlining the H–2A regulatory process to defer many determinations of program compliance until after an Application has been fully adjudicated, do not provide an adequate level of protection for either U.S. or foreign workers.[93]

The 2010 DOL H-2B final rule reversed changes made by the 2008 rule to the H-2A labor certification process and reestablished the type of compliance-demonstration process that had been in effect prior to the 2008 rule.

[90] 2008 DHS H-2A rule; 2010 DOL H-2A rule.

[91] U.S. Department of Labor, Employment and Training Administration, "Temporary Agricultural Employment of H–2A Foreign Workers in the Herding or Production of Livestock on the Range in the United States," 80 *Federal Register* 62958, October 16, 2015.

[92] 2008 DHS H-2A rule; U.S. Department of Labor, Employment and Training Administration and Wage and Hour Division, "Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement," 73 *Federal Register* 77110, December 18, 2008.

[93] U.S. Department of Labor, Employment and Training Administration and Wage and Hour Division, "Temporary Agricultural Employment of H-2A Aliens in the United States," 74 *Federal Register* 45906, 45908, September 4, 2009.

H-2B Rules

The H-2B visa program is governed by a DHS rule issued in 2008 and a DHS/DOL rule issued in 2015.[94] A companion DHS/DOL rule issued in 2015 revised the methodology for calculating prevailing wage rates under the H-2B program.[95]

Background

Mirroring regulatory actions taken on the H-2A program, DHS and DOL under the Bush Administration published final rules to significantly amend their respective H-2B regulations in 2008.[96] Under the DOL H-2B rule, which streamlined the labor certification process, determinations about H-2B program compliance were made only after a labor certification application had been adjudicated.

The Obama Administration retained the DHS H-2B rule but wanted to replace the DOL rule. To that end, DOL published a new H-2B proposed rule in 2011. In this proposed rulemaking, DOL took the position that the 2008 rule did not provide sufficient protections for U.S. or foreign workers. It further described problems of noncompliance:

> [I]n the first year of the operation of the attestation-based system our experience indicates that employers are attesting to compliance with program obligations with which they have not complied, and that employers do not appear to be recruiting, hiring and paying U.S. workers, and in some cases the H-2B workers themselves, in accordance with established program requirements.[97]

DOL issued a replacement H-2B final rule in 2012 that required employers to show compliance with recruitment and other requirements in advance of DOL making a determination on the labor certification application.[98] This rule, however, never became operative due to court action. A key issue in the litigation was whether DOL had the authority to promulgate regulations for the H-2B program.

In April 2015, DOL and DHS issued a new interim final rule on H-2B employment jointly "to ensure that there can be no question about the authority for and validity of the regulations in this area." According to the agencies, the 2015 rule is "virtually identical" to the DOL 2012 final rule.[99]

---

[94] 2008 DHS H-2B rule; 2015 DHS/DOL interim final H-2B rule.

[95] 2015 DHS/DOL final H-2B wage rule. The content of this rule is beyond the scope of this report and is not discussed here.

[96] 2008 DHS H-2B rule; 2008 DOL H-2B rule.

[97] 2011 DOL proposed H-2B rule, p. 15132.

[98] U.S. Department of Labor, Employment and Training Administration and Wage and Hour Division, "Temporary Non-Agricultural Employment of H-2B Aliens in the United States," 77 *Federal Register* 10038, February 21, 2012.

[99] 2015 DHS/DOL interim final H-2B rule, p. 24043.

Author Information

Andorra Bruno
Specialist in Immigration Policy

Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.