Immigration of Temporary Lower-Skilled Workers: Current Policy and Related Issues

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Summary

U.S. employers in various industries argue that they need to hire foreign workers to perform lower-skilled jobs, while others maintain that many of these positions could be filled by U.S. workers. Under current law, certain lower-skilled 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's U.S. Citizenship and Immigration Services (DHS/USCIS) and the Department of Labor's Employment and Training Administration (DOL/ETA).

The H-2A and H-2B programs—and guest worker programs broadly—strive both to be responsive to legitimate employer needs for 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 twin goals. Under the George W. Bush Administration, both DHS and DOL issued regulations to streamline the H-2A and H-2B programs. The Obama Administration retained the DHS rules, but rewrote the DOL rules. Arguing that the latter provided inadequate protections for workers, it issued a new DOL final rule on H-2A employment, which became effective in March 2010. The Obama Administration also issued a new DOL final rule on H-2B employment in 2012 and a DOL final rule on H-2B wage rates in 2011, but neither of these rules is currently in effect.

Bringing workers into the United States under either the H-2A program or H-2B program is a multi-agency process involving DOL, DHS, and the Department of State. As an initial step in the process, employers 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 U.S. workers. The labor certification process has long been criticized as ineffective, with employers complaining that it is burdensome and unresponsive to their labor needs and labor advocates arguing that it provides too few protections for workers.

The H-2A program and foreign agricultural workers in general have been a focus of congressional attention in recent Congresses. Proposals have been introduced as recently as in the 112th Congress that would have amended current law on the H-2A visa, while others would have established new temporary agricultural worker programs as alternatives to the H-2A program. Still other proposals would have coupled a legalization program for agricultural workers with either H-2A or other agricultural labor-related reform. DOL's recent rules on H-2B employment and wages also have been subjects of congressional interest.

Guest worker proposals may contain provisions on a range of component policy issues. Key policy considerations include the labor market test to determine whether U.S. workers are available for the positions, wages, and enforcement. The issue of *adjustment of status*, which means the change to legal permanent resident (LPR) status in the United States, may also arise in connection with guest worker programs.

While the discussion of current guest worker programs in this report focuses on the H-2A and H-2B visas, it also covers the Summer Work Travel (SWT) program, the largest of several programs under the J-1 visa for participants in work- and study-based exchange visitor programs. The SWT program is particularly relevant because participants work largely in unskilled jobs, including H-2B-like seasonal jobs at resorts and amusement parks.

Contents

Does the United States Need to Import Foreign Lower-Skilled Workers? 1
Current Guest Worker Visas 2
Overview of H-2A and H-2B Visas 2
Temporary Labor Certification 3
H-2A Program 4
H-2A Visa Issuances 5
Regulatory Changes 6
H-2B Program 8
H-2B Visa Issuances and the Statutory Cap 9
Recent Regulatory Changes 10
Other Guest Worker-Related Visas 13
J-1 Summer Work Travel Program 13
Unauthorized Employment 16
Employment Eligibility Verification 16
Legislative Reform Efforts 17
Temporary Agricultural Workers 17
Temporary Nonagricultural Workers 18
Policy Considerations 19
Program Administration 19
Labor Market Test 20
Wages 21
Seasonal or Temporary Nature of Work 22
Numerical Limits 23
Treatment of Family Members 23
Adjustment of Status of Guest Workers 24
Enforcement 25
Conclusion 27

Figures

Figure 1. H-2A Visas Issued, FY1992-FY2011 5
Figure 2. H-2B Visas Issued, FY1992-FY2011 10
Figure 3. Participation in the J-1 Summer Work Travel Program 16

Tables

Table 1. DOL H-2A and H-2B Labor Certification Determinations 4
Table A-1. Top States Granted H-2A Labor Certifications: FY2009 and FY2010 28
Table A-2. Top States Granted H-2B Labor Certifications: FY2009 28
Table B-1. Number of H-2B Workers Certified by the U.S. Department of Labor, FY2010 29
Table C-1. Number of H-2A and H-2B Visas Issued, FY1992-FY2011 30

Table E-1. Current and New Regulations for Determining the Prevailing Wage for H-2B Workers 37

Appendixes

Appendix A. DOL H-2A and H-2B Labor Certifications by State 28
Appendix B. DOL H-2B Labor Certifications by Occupation 29
Appendix C. H-2A and H-2B Visa Issuances 30
Appendix D. DHS and DOL Regulations on H-2A and H-2B Nonimmigrants and their Employment in the United States 31
Appendix E. H-2B Wage Requirements 35

Contacts

Author Contact Information 38
Acknowledgments 38

Does the United States Need to Import Foreign Lower-Skilled Workers?

U.S. employers in various industries argue that they need to hire foreign workers to perform low-skilled jobs. A threshold question about importing temporary lower-skilled workers, sometimes referred to as guest workers, is whether U.S. employers need foreign workers for lower-skilled positions, or whether there is a sufficient number of available U.S. workers who could fill these jobs. This question gains salience in times of high U.S. unemployment. The issue of whether U.S. employers need foreign workers is often stated in terms of whether there are domestic labor shortages in particular industries and occupations. Questions about the existence of labor shortages are difficult to answer definitively because of various factors.

The issue of labor shortages in seasonal agriculture, in particular, has been a longstanding concern and is receiving renewed attention. The farm labor shortage issue, however, is surrounded by many unanswered questions, including the following: Would more U.S. workers be willing to become farm workers if wages were raised and the terms of work were changed? If so, would such wage and other changes make the U.S. agricultural industry uncompetitive in the world marketplace? Alternatively, would there be an adequate supply of authorized U.S. farm workers if new technologies were developed and implemented?[1]

In the past, guest workers have been imported to address U.S. worker shortages during times of war. During World War I, for example, tens of thousands of Mexican workers performed mainly agricultural labor as part of a temporary worker program. The controversial Bracero program, which began during World War II and lasted until 1964, brought several million Mexican agricultural workers into the United States. At its peak in the late 1950s, the Bracero program employed more than 400,000 Mexican workers annually.[2] Today, the United States imports guest workers in much smaller numbers to perform temporary agricultural and nonagricultural labor. In current guest worker programs, issues of need for foreign workers are addressed on an individual basis through a process of labor certification.

Guest worker programs remain controversial. Some view them as a necessary source of legal workers and call for their reform and expansion. Others view them, in their current form, as "inherently abusive" and argue that if they are to be allowed to continue operating, they must be thoroughly overhauled.[3]

This report discusses existing visa programs for temporary lower-skilled workers, including regulatory changes since 2008. It covers legislative efforts to reform current programs and to create new guest worker visas. It further identifies and explores key policy considerations to help inform congressional action on guest worker programs.

[1] See archived CRS Report RL30395, *Farm Labor Shortages and Immigration Policy*, by Linda Levine.

[2] For additional information on these historical programs, see U.S. Congress, Senate Committee on the Judiciary, *Temporary Worker Programs: Background and Issues*, committee print, 96th Cong., 2nd sess., February 1980.

[3] See Southern Poverty Law Center, "Close to Slavery: Guestworker Programs in the United States," 2007.

Current Guest Worker Visas

The Immigration and Nationality Act (INA) of 1952, as amended,[4] enumerates categories of aliens, known as nonimmigrants, who are admitted to the United States for a temporary period of time and a specific purpose. Nonimmigrant visa categories are identified by letters and numbers, based on the sections of the INA that established them.[5] Among the major nonimmigrant visa categories is the "H" category for temporary workers. The H category includes H-2A and H-2B visas for guest workers, as well as visas for higher-skilled temporary workers. Foreign nationals can also perform lower-skilled temporary work on certain other nonimmigrant visas.

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

The INA, as originally enacted, 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 services of an exceptional nature requiring distinguished merit and ability) or labor. The 1986 Immigration Reform and Control Act (IRCA)[6] 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 the Employment and Training Administration (ETA) of the Department of Labor (DOL) and U.S. Citizenship and Immigration Services (USCIS) of the Department of Homeland Security (DHS).

While there are many differences between the H-2A agricultural worker program and the H-2B nonagricultural worker program, the process of importing workers under either program entails the same steps. Employers who want to hire workers through either program must first apply to DOL for labor certification, as discussed in the next section. 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]

In both the H-2A and H-2B programs, there is a tension between providing protections to U.S. and foreign workers on the one hand and making the programs responsive to legitimate employer needs on the other. While these competing interests are longstanding, the current environment—with relatively high levels of U.S. unemployment; discussions about expanding the E-Verify electronic employment eligibility verification system (as discussed below); and concerns about shortages of legal workers, especially in agriculture—has heightened the tensions.

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

[5] For an overview of the INA's nonimmigrant visa categories, see CRS Report RL31381, *U.S. Immigration Policy on Temporary Admissions*, by Ruth Ellen Wasem.

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

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

Temporary Labor Certification

DOL's ETA is responsible for administering the labor certification process under the H-2A and H-2B programs. Under both programs, employers submit applications in which they request the certification of a particular number of positions.

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, qualified … and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
>
> (2) the employment of such alien 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 program. 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 found in this country."[9] The H-2B labor certification requirement instead appears in DHS regulations. These regulations 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 a minimum level of wages and benefits that varies by program.

Table 1 provides summary information on H-2A and H-2B labor certification applications. The *position certified* number represents the number of positions for which employers can apply to DHS to fill with foreign workers. Typically, however, employers petition for a smaller number of workers.

[8] INA §218(a)(1)(A), (B).

[9] INA §101(a)(15)(H)(ii)(b).

[10] 8 C.F.R. §214.2(h)(6)(iii)(C).

Table 1. DOL H-2A and H-2B Labor Certification Determinations

Number of positions requested and certified

	Actions	FY2006	FY2007	FY2008	FY2009	FY2010
H-2A	Positions requested	64,146	80,413	86,134	91,739	89,177
	Positions certified	59,110	76,814	82,099	86,014	79,011
	Percentage certified	*92.1%*	*95.5%*	*95.3%*	*93.8%*	*88.6%*
H-2B	Positions requested	247,287	360,147	292,645	218,274	113,031
	Positions certified	199,734	254,615	250,343	154,489	86,596[a]
	Percentage certified	*80.8%*	*70.7%*	*85.5%*	*70.8%*	*76.6%*

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

Note: *Positions requested* refers to the number of workers that employers request certification for. *Positions certified* refers to the number of workers that DOL issues certification for. DOL may certify all the positions requested on an application or it may certify a smaller number.

a. This number is different than the comparable number in DOL's FY2010 annual report on foreign labor certification. The number in the DOL report is not limited to positions certified.

H-2A Program

The H-2A program allows for the temporary admission of foreign workers to the United States to perform agricultural labor or services of a seasonal or temporary nature, provided that U.S. workers are not available. In general, for purposes of the H-2A program, work is of a temporary nature where the employer's need for the worker will last no longer than one year. Thus, an approved H-2A visa petition is generally valid for an initial period of up to one year. 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 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.

As discussed above, an employer who wants to import H-2A workers must first apply to DOL for a certification that (1) there are not sufficient U.S. workers who are qualified and available to perform the work; and (2) the employment of foreign workers will not adversely affect the wages and working conditions of U.S. workers who are similarly employed. Prospective H-2A employers must attempt to recruit U.S. workers and must cooperate with DOL-funded state employment service agencies (also known as state workforce agencies) in local, intrastate, and interstate recruitment efforts. Under the H-2A program's *fifty percent rule*, 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.

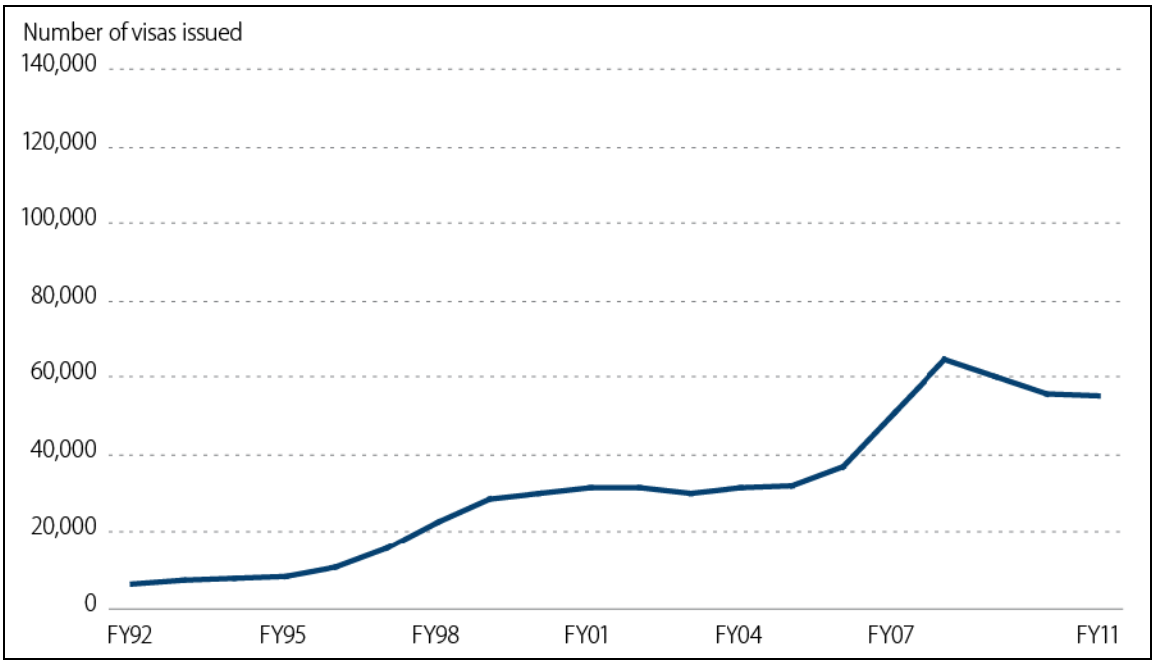
Among the other H-2A labor certification requirements, employers must provide a "three-fourths guarantee"; that is, they must guarantee to offer workers employment for at least three-fourths of the contract period. As discussed below, H-2A employers must pay their H-2A workers and similarly employed U.S. workers the highest of several wage rates and must also provide workers

with housing, transportation, and other benefits, including workers' compensation insurance. No health insurance coverage is required.[11]

As indicated in **Table 1** above, 86,014 H-2A positions were certified for FY2009 and 79,011 were certified for FY2010. Employers in North Carolina received more H-2A certifications than employers in any other state in both years. Other top states, in terms of number of H-2A positions certified, were Florida, Georgia, Kentucky, and Louisiana.[12]

H-2A Visa Issuances

Figure 1. H-2A Visas Issued, FY1992-FY2011



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

Note: FY2011 data are preliminary. See **Appendix C** for underlying data.

The H-2A program is not subject to a statutory numerical limit and has grown significantly over the last 20 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.[13] As explained above, the visa application and issuance process occurs after DOL has granted labor certification and DHS has approved the visa petition. As illustrated in **Figure 1**, the number of H-2A visas issued increased more than fourfold between FY1992 and FY2000, when about 30,000 visas were issued. H-2A visa issuances remained at about 30,000 annually until FY2005 and then started to increase, peaking at more

[11] H-2A workers, like nonimmigrants generally, are not eligible for federally funded public assistance, with the exception of Medicaid emergency services.

[12] See **Appendix A** for data on FY2010 H-2A DOL labor certifications by state.

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

than 64,000 FY2008. The number of H-2A visas issued subsequently declined, totaling some 55,000 in FY2011, according to preliminary DOS data.[14]

Despite its growth since the early 1990s, the H-2A program remains quite small relative to total hired farm employment.[15] This relatively small size has become an issue in the debate about the program. Critics of the H-2A program cite the low levels of participation as evidence of the program's inadequacy to meet the needs of U.S. agricultural employers.[16] Others, however, attribute the program's low utilization to the availability of unauthorized workers, who are willing to work for lower wages than legal workers.[17]

Regulatory Changes

In August 2007, in the aftermath of unsuccessful congressional efforts to enact comprehensive immigration legislation with guest worker provisions, the George W. Bush Administration announced that it would streamline existing guest worker programs within current law. In December 2008, DHS and DOL published final rules to significantly amend their respective H-2A regulations,[18] which went into effect on January 17, 2009. The Obama Administration retained the 2008 DHS rule on the H-2A visa. It sought to review the 2008 DOL rule, and unsuccessfully attempted to suspend it in 2009.[19] DOL subsequently issued a new final H-2A rule, which became effective on March 15, 2010,[20] to replace the 2008 final rule.

DHS H-2A Regulations

The 2008 DHS final rule on the H-2A visa described its purpose as being "to provide agricultural employers with an orderly and timely flow of legal workers, thereby decreasing their reliance on

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

[15] In 2011, 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 748,800. U.S. Department of Agriculture, National Agricultural Statistics Service, *Farm Labor*, November 17, 2011, http://usda01.library.cornell.edu/usda/current/FarmLabo/FarmLabo-11-17-2011.pdf.

[16] See, for example, testimony of Tom Nassif, at U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Immigration, Citizenship, Refugees, and Border Security, *America's Agricultural Labor Crisis: Enacting a Practical Solution*, hearing, 112th Cong., 1st sess., October 4, 2011 (hereinafter cited as Senate hearing on *America's Agricultural Labor Crisis*, October 4, 2011).

[17] See, for example, testimony of Eric A. Ruark, Federation for American Immigration Reform, at Senate hearing on *America's Agricultural Labor Crisis*, October 4, 2011.

[18] 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* 77110-77262, December 18, 2008 (hereinafter cited as 2008 DOL H-2A rule); U.S. Department of Homeland Security, "Changes to Requirements Affecting H-2A Nonimmigrants," 73 *Federal Register* 76891-76914, December 18, 2008 (hereafter cited as 2008 DHS H-2A rule).

[19] See U.S. Department of Labor, Employment and Training Administration and Wage and Hour Division, "Temporary Employment of H-2A Aliens in the United States," 74 *Federal Register* 25972-26015, May 29, 2009, and U.S. Department of Labor, Employment and Training Administration, "U.S. Department of Labor Proposes to Suspend H-2A Rule," news release, March 13, 2009. On June 29, 2009, the scheduled effective date of the rule suspension, the U.S. District Court for the Middle District of North Carolina issued a preliminary injunction against DOL's suspension of its December 2008 final H-2A Rule, http://www.foreignlaborcert.doleta.gov.

[20] 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* 6884-6995, February 12, 2010 (hereinafter cited as 2010 DOL H-2A rule).

unauthorized workers, while protecting the rights of laborers."[21] The rule made various changes to prior regulations to facilitate continued H-2A employment. Among these changes, it modified previous limitations on an H-2A worker's period of stay in the United States. It also extended the period of time that an H-2A worker could remain in the United States after the H-2A petition expired in order to prepare to depart or to seek an extension of stay. In addition, the DHS rule limited participation in the H-2A program to designated countries.[22]

DOL H-2A Regulations

The 2010 DOL final rule on H-A employment issued under the Obama Administration included as its centerpiece, regulations by the Employment and Training Administration concerning H-2A labor certification.[23] It also included regulations by the Wage and Hour Division (WHD) concerning enforcement of contractual obligations under the H-2A program.

The 2010 rule reversed changes made by the 2008 DOL rule to the H-2A labor certification process. Prior to the 2008 rule, the labor certification process was 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.

In the supplementary information accompanying the proposed rule to replace the 2008 rule, DOL 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.[24]

The ETA regulations in the 2010 DOL final rule reestablished the type of H-2A labor certification process that had been in effect prior to the 2008 rule. At the same time, these regulations retained some of the changes to the labor certification process included in the 2008 rule. For example, the 2010 regulations retained the earlier rule's expansion of the definition of agricultural labor or services for the H-2A program to include logging employment.

Under the 2010 DOL H-2A rule, prospective H-2A employers are required to submit a job order to the state workforce agency (SWA) serving the area of intended employment before filing a labor certification application. Once reviewed and cleared by the SWA, the job order becomes the basis for recruiting U.S. workers to fill the employer's job openings. The employer can then file the labor certification application with DOL.

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[21] 2008 DHS H-2A rule, p. 76891. For a more detailed discussion of the DHS H-2A regulations, see **Appendix D**.

[22] The 2012 list of designated countries is included in **Appendix D**.

[23] For a more detailed discussion of the DOL ETA 2010 H-2A regulations, see **Appendix D**.

[24] 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* 45908, September 4, 2009 (hereinafter cited as 2009 DOL proposed H-2A rule).

As part of the labor certification process, H-2A employers have to offer and pay wages that meet specified requirements. The 2010 DOL rule amended existing regulations to require H-2A employers to pay their workers the highest of four wage rates: the federal or applicable state minimum wage, the prevailing wage rate, the adverse effect wage rate (AEWR), or the agreed-upon collective bargaining wage.[25] In addition, the ETA regulations in the 2010 DOL rule included a system of post-certification audits of H-2A employer applications, which were a revised version of the system in the 2008 rule, and expanded DOL's authority to bar employers from participating in the program (known as *debarment* authority).

Wage and Hour Division regulations in the 2010 DOL H-2A final rule addressed enforcement of contractual obligations under the H-2A program. These regulations revised provisions in the 2008 final rule. Among the changes, the 2010 rule provided WHD with independent authority to debar employers for "substantial violations" and increased the civil money penalties for specified violations.

H-2B Program

The H-2B program 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 from the program. In order for work to qualify as temporary under the H-2B visa, the employer's need for the duties to be performed by the worker must be a one-time occurrence, a seasonal need, a peak load need, or an intermittent need.[26] The employer's need for workers under the H-2B program must generally be for a period of one year or less, but, as explained in the discussion of recent regulatory changes below, it could be longer in the case of a one-time occurrence. An alien's total period of stay as an H-2B worker may not exceed three consecutive years.[27] 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.

Like prospective H-2A employers, prospective H-2B employers must first apply to DOL for certification that U.S. workers capable of performing the work are not available and that the employment of alien workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. H-2B employers must pay their workers the highest of the prevailing wage rate or the federal, state, or local minimum wage. Unlike H-2A employers, they are not subject to the AEWR. Traditionally, H-2B employers have been subject to many fewer worker benefit requirements than H-2A employers, but DOL regulations published in February 2012 added new requirements to the H-2B labor certification process. (As explained in the *Recent Regulatory Changes* section, however, these 2012 regulations are not in effect as of this writing.)

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 import a variety of workers. According to DOL labor certification data, the top H-2B occupation in recent years, in

[25] For definitions and further discussion of the H-2A wage rates, see **Appendix D**.

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

[27] 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.

terms of the number of workers certified, has been landscape laborer. Other top occupations include forest worker, housekeeping cleaner, and amusement park worker. [28]

As shown in **Table 1** above, 154,489 H-2B positions were certified for FY2009. Employers in Texas received more than 21,000 of these certifications. Other top states in FY2009, in terms of number of H-2B positions certified, were Florida, Colorado, and Virginia.[29]

H-2B Visa Issuances and the Statutory Cap

Unlike the H-2A visa, the H-2B visa is subject to a statutory numerical limit. Under the INA, 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.[30] This cap does not apply to petitions for current H-2B workers to extend their stay, change their terms of employment, or change or add employers.

As shown in **Figure 2**, the number of H-2B visas issued by DOS[31] dipped between FY1992 and FY1993 and then began to increase fairly steadily until FY2007.[32] As discussed below, a temporary provision exempted certain H-2B workers from the statutory 66,000 cap for three years beginning in FY2005. In both FY2003 and FY2004, however, H-2B visa issuances exceeded the cap.[33]

[28] See **Appendix B** for data on FY2010 H-2B labor certifications by occupation.

[29] Comparable data on H-2B positions certified by state are not available for FY2010. See **Appendix A** for data on FY2009 DOL H-2B labor certifications by state.

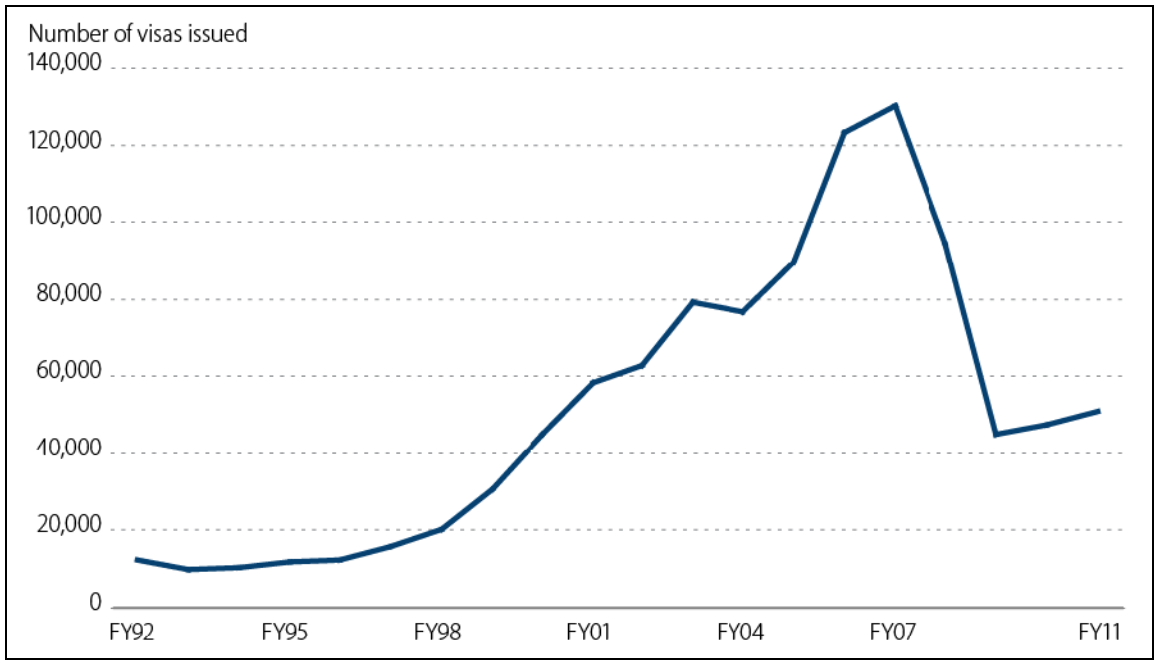
[30] INA §214(g)(1)(B). It should be noted that for various reasons, not all visas issued during a fiscal year necessarily count against that year's cap or, in some cases, any year's cap.

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

[32] See **Appendix C** for annual H-2B visa issuance data.

[33] The cap is implemented by USCIS, which adjudicates H-2B petitions. USCIS approves petitions for more H-2B workers than are allowed by the cap based on assumptions about percentages of workers that will ultimately obtain H-2B visas. If more workers obtain H-2B visas than anticipated, the cap can be exceeded.

Figure 2. H-2B Visas Issued, FY1992-FY2011



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

Notes: In FY2005-FY2007, certain returning H-2B workers were exempt from the statutory cap on the H-2B visa; FY2011 data are preliminary. See **Appendix C** for underlying data.

Recent Regulatory Changes

Mirroring regulatory actions taken on the H-2A program, DHS and DOL under the George W. Bush Administration published final rules to significantly amend their respective H-2B regulations in December 2008.[34] The final rules went into effect on January 18, 2009. The Obama Administration initially retained both the 2008 DHS and DOL final rules on the H-2B visa. In March 2011, however, DOL proposed new regulations to replace the DOL 2008 H-2B rule.[35] A new final rule was published in February 2012, with an effective date in April 2012.[36] The rule did not become operative in April 2012, however. A federal district court in Florida issued a preliminary injunction against the rule, which is being challenged on the grounds that DOL lacks authority over H-2B labor certification rules. The H-2B program is currently operating under the 2008 DOL rule.

[34] U.S. Department of Homeland Security, "Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers," 73 *Federal Register* 78104-78130, December 19, 2008 (hereafter cited as 2008 DHS H-2B rule); 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* 78020-78069, December 19, 2008 (hereinafter cited as 2008 DOL H-2B rule).

[35] 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* 15130-15207, March 18, 2011 (hereinafter cited as 2011 DOL proposed H-2B rule).

[36] 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* 10038-10182, February 21, 2012 (hereinafter cited as 2012 DOL final H-2B rule).

In January 2011, DOL published a separate final rule to revise the methodology for calculating prevailing wage rates under the H-2B program, with an effective date of January 1, 2012.[37] Due to court challenges and congressional action, the effective date of the wage rule has been changed several times. [38] The effective date is currently set at March 27, 2013, in response to language enacted as part of the FY2013 Continuing Appropriations Resolution.[39]

DHS Regulations

DHS's 2008 rule on the H-2B visa made various changes to prior regulations.[40] Among these changes, it redefined "temporary employment" for H-2B purposes to require the prospective H-2B employer to establish that his or her need for the worker would end in the "near, definable future." In the case of a one-time occurrence (one type of allowable need under the H-2B program, as discussed above), the employer's need could last up to three years. Other changes to DHS's H-2B regulations mirrored changes to its H-2A regulations. These included modification of previous limitations on an H-2B worker's period of stay in the United States and limitation of participation in the H-2B program to nationals of designated countries. [41]

DOL Regulations on H-2B Employment

The 2012 DOL final H-2B rule, which, as noted above, is not currently operative, includes regulations by DOL's ETA concerning H-2B labor certification—the main focus of discussion here[42]—and regulations by DOL's WHD concerning H-2B program enforcement.

Under DOL's 2008 rule, the H-2B labor certification process became an attestation-based process, in which employers had to attest in their applications, under threat of penalties, that they had complied with program requirements. The 2012 rule reinstated a certification-based model, in which employers had to show compliance with recruitment and other requirements in advance of a determination on the labor certification application.

As in its explanation of the need for new H-2A rulemaking, DOL stated in the supplementary information accompanying its proposed rule (the precursor to the 2012 final rule) that the existing system of making determinations about program compliance after an application had been adjudicated 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.

[37] U.S. Department of Labor, Employment and Training Administration, "Wage Methodology for the Temporary Non-agricultural Employment H–2B Program," 76 *Federal Register* 3452-3484, January 19, 2011.

[38] For a chronology of changes to the effective date of the January 2011 H-2B wage rule, see **Appendix E**.

[39] P.L. 112-175, September 28, 2012. Appropriations legislation enacted in 2011 (P.L. 112-55, P.L. 112-74) likewise prohibited the use of FY2012 funds to implement the wage rule.

[40] For a more detailed discussion of the DHS 2008 H-2B regulations, see **Appendix D**.

[41] The 2012 list of designated countries is included in **Appendix D**.

[42] For a more detailed discussion of the DOL ETA 2012 H-2B regulations, see **Appendix D**.

> workers, and in some cases the H-2B workers themselves, in accordance with established program requirements.[43]

In addition to returning to a certification-based model, the 2012 rule bifurcated the labor certification application process into distinct registration and application phases and revised application timetables.

The 2012 final rule made a variety of other changes to the H-2B labor certification process. In an expansion of current employer obligations, the final rule required employers to provide workers engaged in *corresponding employment* with at least the same protections, wages, and benefits as those provided to H-2B workers.[44] The final rule also placed new benefit requirements on employers, such as requiring them to pay or reimburse workers for transportation and visa costs.

Additionally, the 2012 DOL rule revised ETA regulations on audits and debarment, mechanisms intended to ensure employer compliance with labor certification requirements. It also added provisions to allow ETA to revoke an H-2B labor certification after it has been approved in specified circumstances.

While the ETA regulations discussed above comprise the main body of the 2012 DOL final H-2B rule, the rule also included regulations by WHD to carry out certain H-2B-related enforcement functions. These functions were delegated by DHS, effective January 18, 2009, to the Secretary of Labor, who, in turn, delegated them to WHD. The final 2012 WHD regulations described the agency's enforcement responsibilities as follows:

> In general, matters concerning the rights of H–2B workers and workers in corresponding employment under this part and the employer's obligations are enforced by the WHD.... The WHD has the responsibility to carry out investigations, inspections, and law enforcement functions and in appropriate instances to impose penalties, to debar from future certifications, to recommend revocation of existing certifications, and to seek remedies for violations[45]

Under the final rule, WHD, like ETA, has independent authority to debar employers for violations.

DOL Regulations on H-2B Wages

As mentioned above, H-2B employers are required to pay workers the highest of the prevailing wage rate or the federal, state, or local minimum wage. In January 2011, DOL issued a final rule to change the methodology for determining prevailing wage rates for the H-2B program.[46] Under the rule, the prevailing wage rate is the highest of four rates: (1) the wage rate that applies to the job under a collective bargaining agreement, (2) the wage rate that applies to the job under the Davis-Bacon Act, (3) the wage rate that applies to the job under the Service Contract Act, or (4) the average wage paid to workers employed in similar jobs in the area of intended employment,

[43] 2011 DOL proposed H-2B rule, p. 15132.

[44] See **Appendix D** for further information about corresponding employment.

[45] 2012 DOL final H-2B rule, p. 10170.

[46] U.S. Department of Labor, Employment and Training Administration, "Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program," 76 *Federal Register* 3452-3484, January 19, 2011.

as determined by DOL's Occupational Employment Statistics (OES) Survey.[47] Many interested parties believe that this rule change would generally increase hourly wages for H-2B workers.[48] As noted above, this rule is not currently in effect.

Other Guest Worker-Related Visas

Beyond the "H" nonimmigrant category, there are other nonimmigrant visas that cover temporary lower-skilled work. Notable among them is the J-1 visa under the "J" nonimmigrant category for exchange visitors. The J-1 visa is for individuals participating in work- and study-based exchange visitor programs and encompasses a variety of work-related programs. Among them are programs for au pairs, camp counselors, and, as discussed below, students engaged in summer work and travel. The J-1 visa is not numerically limited by law. DOS oversees the various J-1 programs and designates sponsor organizations to conduct program activities.

Although many J-1 programs include work, they are not categorized as temporary work programs under the INA and are not subject to standard temporary work program requirements or standard nonimmigrant visa petitioning procedures. For example, the application process for the J-1 programs is different than for the H-2A, H-2B, and other temporary worker programs. Among the differences, the J-1 programs do not require the submission of either a labor certification application to DOL or a nonimmigrant visa petition to DHS. Instead, program administration is handled by the designated sponsors, who are responsible for screening and selecting prospective J-1 participants. An individual who is selected for participation in a J-1 program is issued a form by a sponsor that he or she then uses to apply for a visa at a U.S. embassy or consulate.

J-1 Summer Work Travel Program

The largest J-1 program and the one most relevant to a discussion of guest workers is the Summer Work Travel (SWT) program. DOS describes the SWT program as follows:

> The Summer Work Travel program provides foreign students with an opportunity to live and work in the United States during their summer vacation from college or university to experience and to be exposed to the people and way of life in the United States.[49]

SWT participants perform a variety of jobs, but, according to DOS, "work in largely unskilled positions."[50] Among the positions they hold are H-2B-like seasonal jobs at resorts and amusement parks. By regulation, as discussed below, SWT participants are excluded from performing certain types of work, including domestic help in private homes.

[47] See **Appendix E** for further information about the wage requirements under the January 2011 rule.

[48] See, for example, Amber McKinney, "H-2B Wage Rule Should Be Implemented To Protect Workers, Labor, Rights Groups Say," *Daily Labor Report*, October 21, 2011.

[49] U.S. Department of State, "J-1 Visa Exchange Visitor Program, Summer Work Travel Program," http://j1visa.state.gov/programs/summer-work-travel.

[50] U.S. Department of State, "Exchange Visitor Program—Cap on Current Participant Levels and Moratorium on New Sponsor Applications for Summer Work Travel Program," Notice, 76 *Federal Register* 68808-68809, November 7, 2011.

Administrative Changes

In April 2011, DOS issued an interim final rule to amend its regulations on the SWT program.[51] The rule became effective in July 2011. In the supplementary information accompanying the rule, DOS explained the need for modifications as follows:

> The Department has examined the potential risks and harms related to the Summer Work Travel program and believe[s] that the current regulations do not sufficiently protect national security interests; the Department's reputation; and the health, safety, and welfare of Summer Work Travel program participants.[52]

DOS cited an increase in the number of complaints about the SWT program during the summer of 2010 involving "fraudulent job offers, inappropriate jobs, job cancellations on arrival, insufficient number of work hours, and housing and transportation problems," as well as more general concerns about the increased incidence of criminal activity, such as money laundering and identity theft, in some unspecified nonimmigrant visa categories.[53]

The 2011 rule added new requirements under the SWT program and increased the responsibility of designated sponsors to perform oversight. The program-wide rule built on a pilot program implemented in 2011 that placed additional requirements on SWT participants from six countries[54] due to concerns about criminal activity. The rule established separate sets of job placement procedures for participants from Visa Waiver countries[55] and non-Visa Waiver countries based on the idea that the former faced less risk of harm related to SWT program participation. A main difference was that sponsors had to ensure that participants from non-Visa Waiver countries had job placements when they entered the United States.

Under the 2011 rule, sponsors had to vet prospective U.S. host employers and job offers, and they had to ensure that the employers fulfilled their obligations under the SWT program. These obligations included paying participants at least the prevailing wage rate and providing them with the number of weekly hours listed on the job offer. Sponsors also had to screen and vet foreign entities that assist them in conducting core functions of the program, such as participant screening and selection. In addition, the rule expanded the monitoring responsibilities of sponsors, requiring them to contact program participants on a monthly basis.

The 2011 DOS rule expanded provisions in prior regulations regarding prohibited work activities under the SWT program. Under the prior regulations, participants could not hold positions as domestic employees in U.S. households or positions that required them to invest money in inventory for door-to-door sales. The 2011 rule clarified the domestic help restriction by providing examples of the types of positions that SWT participants cannot hold: they cannot provide child care or elder care and cannot work as gardeners or chauffeurs. The rule retained the restriction on sales positions that require the purchase of inventory and enumerated other types of

[51] U.S. Department of State, "Exchange Visitor Program—Summer Work Travel," 76 *Federal Register* 23177-23185, April 26, 2011 (hereinafter cited as 2011 DOS SWT rule).

[52] 2011 DOS SWT rule, p. 23177.

[53] Ibid., p. 23177.

[54] The countries were Belarus, Bulgaria, Moldova, Romania, Russia, and the Ukraine.

[55] The visa waiver program (VWP) allows nationals from certain countries to enter the United States for business or pleasure as nonimmigrants without first obtaining a visa from a U.S. consulate abroad. For additional information, see CRS Report RL32221, *Visa Waiver Program*, by Alison Siskin.

prohibited work, such as positions in the adult entertainment industry and positions in clinical care that entail patient contact.

In November 2011, in the face of continuing complaints about the SWT program, DOS announced additional limitations on the program in a public notice. It announced that it was restricting the program to the number of participants in 2011 (approximately 103,000) and that it would not designate any new SWT sponsor organizations. The notice indicated that these restrictions would remain in effect until DOS completed an ongoing review of the SWT program and its regulations and "implements the next steps."[56]

In May 2012, DOS published a second interim final rule on the SWT program, most of which became effective that month.[57] This rule made changes to the 2011 interim rule and also implemented new regulations intended to enable the U.S. government "to better regulate sponsors in order to protect participants, the program itself, and U.S. communities that support Summer Work Travel participants."[58]

As characterized in the supplementary information accompanying the 2012 interim rule, the new regulations "expand sponsors' obligations with respect to the cultural component mandated by the Act [Mutual Educational and Cultural Exchange Act of 1961], clarify characteristics of jobs that are consistent with the purpose of the Act, [and] identify jobs that are inconsistent with the purpose of the Act."[59] Among the new requirements under the 2012 rule, SWT participants must be placed in jobs that are seasonal or temporary, and there must be opportunities for participants to interact with U.S. citizens and experience American culture during the work component of the program. The new rule also placed new responsibilities on sponsors that were intended to protect U.S. workers. For example, under the new regulations, sponsors must confirm each season that prospective host employers will not displace U.S. workers at worksites where SWT participants will be placed.

In the supplementary information accompanying the 2012 interim rule, DOS also addressed the issue of a numerical cap. It stated that the SWT program would "proceed for the near future at a level not to exceed 109,000 participants annually."[60]

Participation in the SWT Program

According to USCIS's Student and Exchange Visitor Information System (SEVIS), which maintains information about nonimmigrant students and exchange visitors in the United States, more than 100,000 foreign nationals have participated in the J-1 SWT program each year since 2005 (see **Figure 3**). It is not known, however, precisely how many of these participants held H-2B-like jobs.

[56] U.S. Department of State, "Exchange Visitor Program—Cap on Current Participant Levels and Moratorium on New Sponsor Applications for Summer Work Travel Program," Notice, 76 *Federal Register* 68808-68809, November 7, 2011.

[57] U.S. Department of State, "Exchange Visitor Program—Summer Work Travel," 77 *Federal Register* 27593-27612, May 11, 2012 (hereinafter cited as 2012 DOS SWT rule).

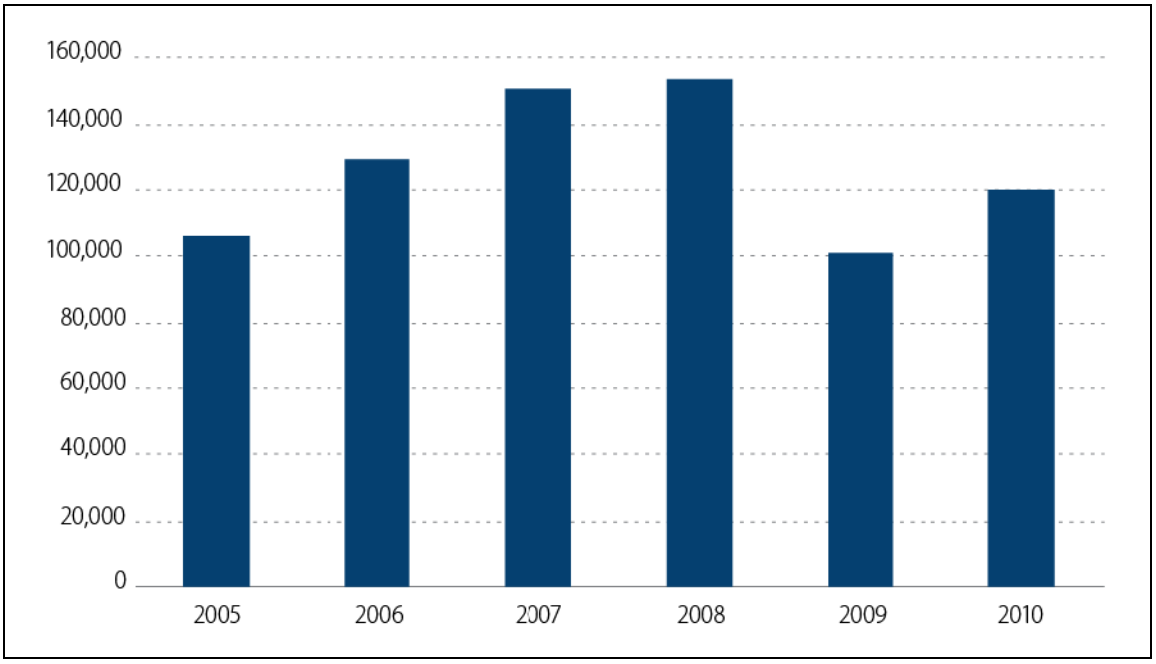
[58] Ibid., p. 27595.

[59] Ibid., p. 27595.

[60] Ibid., p. 27596.

Figure 3. Participation in the J-1 Summer Work Travel Program

Number of participants



Source: CRS presentation of data from Department of Homeland Security's Student and Exchange Visitor Information System (SEVIS) database, provided by U.S. Department of State.

Unauthorized Employment

Policy discussions about guest worker programs necessarily involve consideration of unauthorized workers, who have traditionally performed lower-skilled work in a variety of industries. It is widely believed that most unauthorized aliens enter and remain in the United States in order to work. The Pew Hispanic Center (Center), which regularly analyzes data and issues reports on the unauthorized alien population in the United States, has estimated that there were 8.0 million unauthorized workers in the U.S. civilian labor force in March 2010. These unauthorized workers accounted for 5.2% of the civilian labor force.[61]

Employment Eligibility Verification

To prevent unauthorized immigrants from obtaining employment, policymakers have established systems for verifying the employment eligibility of workers. Currently, all employers must examine documents presented by new hires to verify identity and work authorization and must

[61] Jeffrey S. Passel and D'Vera Cohn, *Unauthorized Immigrant Population: National and State Trends, 2010*, Pew Hispanic Center, February 1, 2011, p. 17 (hereinafter cited as Passel and Cohn, *Unauthorized Immigrant Population, 2010*). The Pew Hispanic Center estimates that the unauthorized alien share of the civilian labor force was between 5.0% and 5.5% in each year from 2005 to 2010.

complete and retain employment eligibility verification (I-9) forms. This document review process has been largely undermined by the ready availability of fraudulent documents.[62]

Employers may also participate in the E-Verify electronic verification system administered by USCIS. E-Verify is primarily a voluntary program, although there are some mandatory participants.[63] There are ongoing legislative efforts to make E-Verify or a similar system mandatory for all employers.[64] Some are concerned that such a mandatory electronic employment eligibility verification system would result in labor shortages in industries with large numbers of unauthorized workers, such as agriculture.

Legislative Reform Efforts

Since the 1990s, a variety of legislative proposals have been put forth 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.

Recently, congressional interest in the area of guest worker programs has been focused mainly on temporary agricultural workers. This focus stems, in part, from concerns of Members of Congress that legislative efforts to make E-Verify or another electronic employment eligibility verification system mandatory, as discussed above, would lead to agricultural worker shortages.

Temporary Agricultural Workers

Over the years, both growers and labor advocates have criticized the H-2A program. Growers complain that the program is administratively cumbersome, expensive, and ineffective in meeting their labor needs. Labor advocates argue that the program provides too few protections for workers.

In the late 1990s, representatives of growers and workers reached agreement on legislation to address the foreign agricultural worker issue. The legislation became known as the Agricultural Job Opportunities, Benefits, and Security Act, or AgJOBS. It combined provisions to reform the H-2A program with a program to legalize the status of farm workers though a two-stage process. During the 106th Congress, AgJOBs legislation[65] became the basis of a bipartisan compromise on foreign agricultural workers, but that compromise fell apart at the end of the 2000s. More

[62] See, for example, Marc R. Rosenblum, *E-Verify: Strengths, Weaknesses, and Proposals for Reform*, Migration Policy Institute, February 2011, http://www.migrationpolicy.org/pubs/E-Verify-Insight.pdf. The use of fraudulent documents to satisfy I-9 requirements is a longstanding issue. See U.S. General Accounting Office, *Illegal Aliens: Significant Obstacles to Reducing Unauthorized Alien Employment Exist, GGD-99-33*, April 2, 1999.

[63] See CRS Report R40446, *Electronic Employment Eligibility Verification*, by Andorra Bruno.

[64] See CRS Report R42036, *Immigration Legislation and Issues in the 112th Congress*, coordinated by Andorra Bruno.

[65] Two similar AgJOBs bills (S. 1814 and H.R. 4056) were introduced in the 106th Congress. Formal congressional consideration was limited to a Senate Immigration Subcommittee hearing on S. 1814.

recently, AgJOBS titles were included in comprehensive immigration reform bills considered in the 109th and 110th Congresses. None of these bills were enacted.[66]

Foreign agricultural workers have been a recent focus of attention in Congress, with the immigration subcommittees of both the House and the Senate Judiciary Committees holding related hearings in 2011 and 2012. A number of legislative proposals on agricultural guest workers have likewise been put forward in the 112th Congress. Some bills would amend INA provisions on the H-2A visa,[67] while others would establish new temporary agricultural worker programs as alternatives to the H-2A program.[68] Still other proposals would couple a legalization program for agricultural workers either with H-2A reform, as in the traditional AgJOBS formulation, or with other changes to current law on agricultural labor.[69]

Temporary Nonagricultural Workers

Historically, the H-2B program has not been subject to the same level of employer criticism about administrative burden and expense as the H-2A program. Instead, in years of high demand for H-2B workers, employer criticism and related reform efforts have centered on the statutory annual numerical cap of 66,000. In past Congresses, as discussed above, legislation was enacted to establish a temporary exemption from the cap for certain returning H-2B workers. Following the expiration of that temporary provision in 2007, there were unsuccessful legislative efforts to reinstate some type of returning worker exemption.[70]

In addition to these legislative efforts targeted at the H-2B cap, comprehensive immigration reform bills introduced in past Congresses have included provisions related to the H-2B visa and temporary nonagricultural workers generally. Various bills over the years have proposed to make changes to the H-2B visa and to establish new guest worker programs for temporary nonagricultural workers.[71] One feature common to many of the latter proposals for new programs is that they would have enabled employers to hire workers to meet ongoing labor needs on a temporary basis. They would not have been subject to the limitation under the H-2B program that the employer demonstrate a seasonal or temporary need (see discussion of H-2B temporary need requirements, above, and discussion of seasonal or temporary need issues, below).

Other H-2B bills in recent Congresses have proposed to reform the H-2B visa by increasing labor protections under the program. These proposals have sought to strengthen protections in various areas, including federal labor law enforcement, recruitment of U.S. workers, and wages. They have likewise included provisions on labor recruiter accountability.[72]

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[66] Different versions of AgJOBS bills, all with legalization and H-2A reform components, have been introduced in every Congress since the 106th Congress.

[67] See, for example, S. 1384 in the 112th Congress.

[68] See, for example, H.R. 2847 and H.R. 2895 in the 112th Congress.

[69] See, for example, S. 1258 and H.R. 3017 in the 112th Congress.

[70] See CRS Report RL34204, *Immigration Legislation and Issues in the 110th Congress*, coordinated by Andorra Bruno. In the 112th Congress, H.R. 3686 would establish a new H-2B returning worker exemption from the statutory cap.

[71] See, for example, the discussion of guest worker legislation in archived CRS Report RL32169, *Immigration Legislation and Issues in the 108th Congress*, by Andorra Bruno et al.; and archived CRS Report RL33125, *Immigration Legislation and Issues in the 109th Congress*, coordinated by Andorra Bruno.

[72] See, for example, S. 2910 and H.R. 4321 in the 111th Congress.

Policy Considerations

Generally speaking, as discussed above, guest worker programs try to achieve two goals simultaneously: to be responsive to legitimate employer needs for 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 its 2011 proposed rule on the H-2B visa (the precursor to the 2012 final rule). Supplementary information accompanying the 2011 proposal stated:

> 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.[73]

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

The following discussion focuses on the H-2A and H-2B programs and related legislative proposals. It also references the J-1 SWT program, which provides participating employers with seasonal labor but, as noted above, is not characterized as a temporary worker program under immigration law.

Program Administration

As previously mentioned, the H-2A and H-2B programs are administered by DOL and DHS, with DOL making a determination on the labor certification application and DHS adjudicating the nonimmigrant visa petition. Under the INA, as explained above, prospective H-2A employers must apply to DOL for labor certification. In the case of the H-2B visa, the INA does not require DOL labor certification. 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.[74] The requirement for H-2B labor certification is established by regulation. Under the J-1SWT program, as set forth in DOS regulations, designated sponsors are responsible for program administration.

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. 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 application.[75] In the supplementary

[73] 2011 DOL proposed H-2B rule, p. 15133.

[74] INA §214(c)(1).

[75] U.S. Department of Homeland Security, "Petitions for Aliens To Perform Temporary Nonagricultural Services or Labor (H–2B)," 70 *Federal Register* 3984-3993, January 27, 2005 (hereafter cited as 2005 DHS proposed H-2B rule); 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* 3993-3997, January 27, 2005. Under this proposal, DOL would have conducted post-certification audits.

information accompanying its 2005 proposal, DHS explained the rationale for the change, as follows:

> DHS has determined that the H-2B process should be modified to reduce unnecessary burdens that hinder petitioning employers' ability to effectively use this visa category…. The delays in processing applications for labor certification combined with the relatively short period of time for which the worker will be available under current rules have discouraged use of the program. This rule will remove existing regulatory barriers and thus likely lead to more efficiency in the H-2B program.[76]

Other proposals would assign administrative responsibility elsewhere. For example, a comprehensive immigration bill introduced in 2005 would have given the Secretary of State primary administrative responsibility for a new nonagricultural guest worker program.[77] A more recent legislative proposal, discussed in the next section, would establish a new temporary agricultural worker visa administered by the Department of Agriculture, in consultation with DHS.

Labor Market Test

A key question about any guest worker program is 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, and ineffective in protecting U.S. workers.

A main difference between the DOL H-2A and H-2B rules issued by the George W. Bush Administration in 2008 and the rules issued by the Obama Administration in 2010 and 2012 concerns implementation of the labor market test. As discussed above, the 2008 DOL rules for both programs changed the traditionally supervised labor certification process into an attestation-based certification process. 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."[78] Legislative guest worker proposals in recent Congresses have also incorporated various forms of labor attestation.

The 2010 DOL final H-2A rule and the 2012 DOL final H-2B rule return to a supervised, certification-based model of labor certification. In the supplementary information accompanying

[76] 2005 DHS proposed H-2B rule, p. 3984.

[77] See S. 1033 in the 109th Congress.

[78] 2009 DOL proposed H-2A rule, p. 8542.

the 2010 final H-2A rule, DOL identified its "primary concern with respect to its statutory mandate" as "restoring necessary protections to U.S. and foreign workers while maintaining a fair and reliable process for addressing legitimate employer needs."[79] The 2011 DOL proposed H-2B rule echoed these concerns about worker protections:

> [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.[80]

As detailed above, the 2012 final H-2B rule included other changes to the labor certification process, including an extension of the U.S. worker recruitment period**.**

Despite the differences between the George W. Bush and Obama Administrations' DOL rules, the underlying requirements for employers to recruit U.S. workers are similar. Under both sets of rules, employers are required to cooperate with, and accept referrals of workers from, state workforce agencies and to engage in independent recruitment efforts, such as placing print job advertisements.

While U.S. worker recruitment is a standard feature of guest worker programs, such a requirement can take different forms and does not necessarily have to be contained within a larger DOL labor certification process. For example, one 2011 legislative proposal to establish a new temporary agricultural worker visa would require employers to recruit U.S. workers by posting the job opportunity on a DOL electronic job registry; the posting would include the work period, wages, and other terms of employment.[81] DOL would not perform any type of labor certification function. The job posting would be a prerequisite for applying for enrollment in the new program, which would be administered by the Department of Agriculture (USDA) in consultation with DHS. Under the proposal, agricultural employers would submit information that USDA would use to determine the number of agricultural workers required.

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. As described above, under the H-2A program, employers must pay their workers the highest of the federal or applicable state minimum wage, the prevailing wage rate, the adverse effect wage rate (AEWR), or the agreed-upon collective bargaining wage. Under the H-2B program, employers must pay their workers the highest of the prevailing wage rate or the federal, state, or local minimum wage. Under the J-1 SWT program, SWT participants must be paid the highest of the prevailing local wage or the federal or state minimum wage.

Wage requirements have been a key area of controversy about the H-2A program, which is the only nonimmigrant program subject to the AEWR. Farm labor advocates argue 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

[79] 2010 DOL H-2A rule, p. 6903.

[80] 2011 DOL proposed H-2B rule, p. 15132.

[81] See H.R. 2995 in the 112th Congress.

proposals to reform the H-2A program or establish new agricultural guest worker programs have typically included provisions to eliminate the use of the AEWR,[82] or, more recently, to redefine the AEWR.[83]

The 2011 DOL rule on H-2B wage rates has been highly controversial, with some critics arguing that the new wage requirements will make the H-2B program prohibitively expensive.[84] As mentioned, in response to legislation enacted by the 112th Congress to prohibit use of funds to implement the new wage methodology for the first six months of FY2013, DOL has postponed the effective date of the rule until March 27, 2013.

Seasonal or Temporary Nature of Work

The H-2A and H-2B programs are, by definition, limited to seasonal or temporary work.[85] They are intended to meet employers' temporary—and not permanent—needs for labor when U.S. workers cannot be found.

This "seasonal or temporary" requirement places restrictions on both programs. With respect to the H-2A program, it means that the program cannot be used for year-round agricultural activities absent a statutory provision. There are special provisions that apply to certain year-round activities. For example, the INA definition of the H-2A nonimmigrant visa explicitly permits the use of the H-2A program for the "pressing of apples for cider on a farm." Special procedures also are in place for sheepherders and goatherders to work through the H-2A program.[86] Legislation in recent 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 current law.[87]

Under the H-2B program, as described above, the employer's need for the duties to be performed by the worker must be a one-time occurrence, seasonal need, peak load 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.[88] This change, which was not enacted, would have permitted H-2B workers to fill a wider range of job openings. Some past comprehensive immigration reform proposals also would have established new nonagricultural

[82] See, for example, H.R. 2847 in the 112th Congress.

[83] See, for example, S. 1384 in the 112th Congress. Under the bill, the AEWR would be defined as 115% of the greater of the applicable state or federal minimum wage.

[84] See **Appendix E** for further information about the wage requirements.

[85] The INA definition of the H-2A nonimmigrant category generally requires the agricultural work to be "of a temporary or seasonal nature" (§101(a)(15)(H)(ii)(a)), and the INA definition of the H-2B nonimmigrant category requires the performance of nonagricultural "temporary service or labor" (§101(a)(15)(H)(ii)(b)).

[86] These activities are not mentioned in the INA definition of the H-2A nonimmigrant category. However, according to DOL, these special procedures have a statutory basis. DOL addressed sheepherders in the supplementary information accompanying its 2010 H-2A final rule: "Sheepherders … owe their inclusion in the program to a statutory provision dating back to the 1950s. That legislative inclusion was implicitly ratified in [the Immigration Reform and Control Act of 1986]"; 2010 DOL H-2A rule, p. 6891.

[87] See, for example, H.R. 3232 and S. 1697 in the 112th Congress.

[88] See, for example, S. 2010 and S. 2381/H.R. 4262 in the 108th Congress and S. 1918 in the 109th Congress. Also see discussion of these bills in archived CRS Report RL32044, *Immigration: Policy Considerations Related to Guest Worker Programs*, by Andorra Bruno.

guest worker programs that would not have required a showing of temporary need and, in some cases, would have allowed for the initial admission of workers for two years or more.[89]

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. Currently, the H-2A visa and the J-1 visa are not numerically limited by law. As explained, however, DOS has announced that it is restricting the J-1 SWT program to 109,000 annually. The H-2B program, by contrast, is statutorily capped at 66,000 annually. Like the H-2B program, other capped temporary worker programs in current law have fixed statutory numerical limits.

More flexible numerical caps, however, have been incorporated into guest worker proposals in both past Congresses and in the current Congress. For example, a guest worker program that was outlined by former Senator Phil Gramm during the 107th Congress, but never introduced as legislation, included a numerical cap—one that would have varied annually based on regional unemployment rates. According to the program prospectus released by Senator Gramm:

> Except for seasonal work, the number of guest workers permitted to enroll would be adjusted annually in response to changes in U.S. economic conditions, specifically unemployment rates, on a region-by-region basis.

A comprehensive immigration bill proposed in the 110th Congress would have established a new nonimmigrant visa with a numerical cap that would have varied based on demand for the visa.[90] A bill introduced in 2011 would establish a new agricultural worker visa with monthly and annual numerical limitations. These caps would be based on data and information provided by agricultural employers and would "tak(e) into consideration the historical employment needs of agricultural employers and the reports of United States workers applying for agricultural employment."[91]

Treatment of Family Members

Currently, the INA allows for the admission of the spouses and minor children of alien workers on H-2A, H-2B, and other "H" visas who are accompanying or following to join the worker in the United States.[92] While making provision for the admission of guest workers' spouses and minor children enables families to stay together, this practice has been faulted for decreasing incentives for guest workers to return home after their authorized period of stay. Some legislative proposals

[89] See, for example, S. 1461/H.R. 2899 and S. 2381/H.R. 4262 in the 108th Congress.

[90] See, for example, S. 1639 in the 110th Congress.

[91] See, for example, H.R. 2895 in the 112th Congress.

[92] Like the principal alien, these family members must be admissible under immigration law. The INA sets forth various grounds of inadmissibility, which include health-related grounds, security-related grounds, public charge (i.e., indigence), and lack of proper documentation. For additional information on inadmissibility under immigration law, see CRS Report R41104, *Immigration Visa Issuances and Grounds for Exclusion: Policy and Trends*, by Ruth Ellen Wasem.

to establish new guest worker programs would explicitly prohibit family members from accompanying or following to join principal aliens.[93]

Adjustment of Status of Guest Workers

The issue of adjustment of status, or the change of immigration status to legal permanent resident (LPR) status in the United States,[94] arises in connection with guest worker programs. Legal lower-skilled guest workers have very limited opportunities under current law to obtain legal permanent residence.[95] For those who enter legally but remain beyond their authorized period of stay and lapse into illegal status, the opportunities are even more limited.

Various proposals have been put forth in recent years to enable guest workers to adjust status. AgJOBS legislation, as discussed above, combines reform of the H-2A guest worker program with a separate program to legalize the status of agricultural workers. Under AgJOBS, farm workers who satisfy a set of requirements would first apply for a legal temporary resident status and then, after meeting additional work and other requirements, could apply to adjust to LPR status. Some comprehensive immigration reform bills in past Congresses have similarly proposed to change the status of eligible unauthorized workers to a new nonimmigrant worker status, and then, subject to additional requirements, to adjust the status of these nonimmigrants to LPR status.[96]

Some immigration proposals would establish special mechanisms for guest workers who enter the United States *legally* to adjust to LPR status. Proposals that would enable guest workers to seek LPR status take different forms. For example, some past comprehensive immigration reform bills would have established new guest worker visas, together with special mechanisms for participants to adjust status.[97]

A policy proposal to replace existing nonimmigrant visas for nonagricultural, nonseasonal work (including some H-2B work) with *provisional visas* offers another model for facilitating adjustment of status. As described in a 2009 Migration Policy Institute report, provisional visas would provide for the transition from temporary to permanent status for interested and eligible workers.[98] According to the report, the adoption of provisional visas would be most effective as part of a larger reform of temporary worker categories but such a system could also be "overlaid on existing visa categories" with visa holders receiving "the new 'terms and conditions' of visa

[93] See, for example, H.R. 2847 in the 112th Congress.

[94] The term *adjustment of status* is also commonly used to refer to the change of status to a legal temporary resident status.

[95] In terms of employment-based avenues, there is one permanent visa category for workers capable of "performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States," which is capped at 10,000 visas annually (INA §203(b)(3)(A)(iii)). A greater number of visas are available for workers capable of performing "skilled labor (requiring at least 2 years training or experience)" (INA §203(b)(3)(A)(i)). In addition, guest workers, like foreign nationals generally, can obtain LPR status through a legitimate marriage to a U.S. citizen. For additional information on the permanent immigration system, CRS Report RL32235, *U.S. Immigration Policy on Permanent Admissions*, by Ruth Ellen Wasem.

[96] See, for example, S. 1033/H.R. 2330 in the 109th Congress.

[97] See, for example, S. 1033/H.R. 2330 and S. 2611 in the 109th Congress.

[98] Demetrios Papademetriou, Doris Meissner, Marc Rosenblum, and Madeleine Sumption, *Aligning Temporary Immigration Visas with US Labor Market Needs: The Case for a New System of Provisional Visas*, Migration Policy Institute, July 2009, http://www.migrationpolicy.org/pubs/Provisional_visas.pdf.

portability[99] and a predictable path to earning permanent residence."[100] The Obama Administration's 2011 blueprint for immigration reform proposed the creation of a new temporary worker program for lower-skilled workers that seemed to embody these principles. The program would be limited to nonagricultural, nonseasonal workers, who would be given "important labor protections, portability, and the ability to seek permanent residence." [101]

Enforcement

Another set of considerations relates to enforcement of the terms of a guest worker program. 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. [102]

With respect to the H-2B program, more limited language added to the INA in 2005 authorizes 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." The Secretary of Homeland Security is further authorized to delegate any of this enforcement authority to the Secretary of Labor in accordance with an agreement between the two agencies.[103] The Secretary of Homeland Security subsequently made this delegation of authority and now DOL's Wage and Hour Division is responsible for the enforcement of the terms and conditions of H–2B labor certifications.

The 2008 DOL final rules on H-2A employment and H-2B employment put in place a compliance model that combined a streamlined labor certification process with post-certification enforcement mechanisms, including audits, civil money penalties, and debarment. In proposing to rewrite these rules and reinstate a model in which employers demonstrate compliance prior to certification, the Obama Administration cited concerns about employer noncompliance with program requirements under the 2008 rules.

The 2010 DOL final H-2A rule and the 2012 DOL final H-2B rule incorporate a compliance-demonstration system. In supplementary information accompanying the 2011 proposed H-2B rule (precursor to the 2012 final rule), DOL questioned the appropriateness of a post-certification enforcement system for a temporary worker program, in which "non-compliance would likely be identified through enforcement efforts well after the impacted H-2B workers have returned to their home country or the U.S. workers were already denied employment."[104]

Another enforcement-related question is what type of mechanism, if any, ensures that guest workers do not remain in the United States beyond their authorized period of stay. Historically,

[99] Visa portability refers to the ability of a worker to change employers freely without applying for a new visa.

[100] Ibid., p. 15.

[101] The White House (Obama), *Building a 21st Century Immigration System*, May 2011, http://www.whitehouse.gov/sites/default/files/rss_viewer/immigration_blueprint.pdf.

[102] INA §218(g)(2).

[103] INA §214(c)(14).

[104] 2011 DOL proposed H-2B rule, p. 15133.

the removal of aliens who have overstayed their visas and thereby lapsed into unauthorized status, but have not committed crimes, has not been an immigration enforcement priority.

Among the related regulatory provisions are provisions establishing notification requirements for H-2A and H-2B employers. DHS regulations on the H-2A visa and the H-2B visa, as modified by the 2008 final rules, 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[105] 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.[106] In supplementary information accompanying the H-2B final rule, DHS explained the purpose of these notification requirements as being

> to enable DHS 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.[107]

To help ensure that H-2A and H-2B workers departed the United States at the end of their authorized period of stay, the 2008 DHS final rules on the H-2A visa and the H-2B visa also established a pilot program, known as the Temporary Worker Visa Exit Program Pilot. Under the pilot program, which began in December 2009, H-2A and H-2B aliens who were admitted to the United States at certain designated ports of entry were required to depart the country from one of these designated ports and provide certain biographic and biometric information. According to DHS, the program was "designed to positively record the departure [of workers] by utilizing the biographic and biometric information submitted at the time of entry and departure."[108]

The pilot program was discontinued effective September 29, 2011. In the notice announcing the discontinuation of the program, DHS's U.S. Customs and Border Protection (CBP) indicated that during the pilot period, "DHS gathered enough data to assess the pilot's technology, design and implementation and to identify lessons learned that can be applied to programs that may have similar requirements."[109]

Other ideas have been proposed to help ensure the departure of temporary workers at the end of their authorized period of stay. One suggestion is to involve the workers' home countries in guest worker programs. Another option is to create an incentive for foreign workers to leave the United States by, for example, withholding from earnings or otherwise setting aside a sum of money for each worker that would become available only once the worker returned home.[110]

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[105] *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).

[106] 8 C.F.R. §§214.2(h)(5)(vi)(B), (h)(6)(i)(F)(1).

[107] 2008 DHS H-2B rule, p. 78116.

[108] Ibid., p. 78118.

[109] Looking toward possible future efforts along these lines, the notice further stated: "The pilot reinforced the need to gain a full understanding of the covered population's skill sets in order to craft effective public information materials and to utilize appropriate technology that will support a high degree of compliance…. The pilot also demonstrated that DHS must evaluate carefully the considerable time and resources that may be required by field personnel in order to continually support and explain processes used infrequently by a nonimmigrant population subject to a program specific to that population." U.S. Department of Homeland Security, U.S. Customs and Border Protection, "Notice of Discontinuation of H-2A and H-2B Temporary Worker Visa Exit Program Pilot CBP Dec. 11–16," 76 *Federal Register* 60519, September 29, 2011.

[110] See, for example, H.R. 2895 in the 112th Congress.

Conclusion

For many years, there has been broad dissatisfaction with existing guest worker programs and periodic activity to enact reform. The last time Congress considered significant reform to lower-skilled temporary worker programs, it did so in the context of comprehensive immigration reform legislation, in which guest worker programs were an ancillary focus. Today's discussions about possible guest worker reform are focused more squarely on the programs themselves and on the needs of employers and workers. The tension between these often competing needs lies at the core of the debate about how to proceed with reform. The H-2A and H-2B regulations issued by the George W. Bush Administration and the Obama Administration reflect very different views about how to balance employer and worker needs, as do recent legislative proposals. It would seem, however, that in the current environment some type of compromise on employer and worker needs—in the policy areas highlighted here and/or in other areas—may be essential to achieving significant guest worker reform legislatively.

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

Table A-1. Top States Granted H-2A Labor Certifications: FY2009 and FY2010

Rankings based on number of positions certified

	FY2009		FY2010	
Ranking	**State**	**Positions Certified**	**State**	**Positions Certified**
1	North Carolina	8,728	North Carolina	9,387
2	Louisiana	6,681	Louisiana	6,967
3	Georgia	6,654	Georgia	5,561
4	Florida	5,820	Kentucky	5,455
5	Kentucky	5,754	Florida	4,510
6	New York	4,313	Arizona	4,309
7	California	3,503	New York	3,858
8	Arizona	3,402	Washington	3,014
9	Arkansas	3,037	Arkansas	3,006
	Total, All States	**86,014**	**Total, All States**	**79,011**

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

Table A-2. Top States Granted H-2B Labor Certifications: FY2009

Rankings based on number of positions certified

Ranking	State	Number of Positions Certified
1	Texas	21,302
2	Florida	11,569
3	Colorado	8,691
4	Virginia	8,612
5	Louisiana	7.716
6	New York	6,861
7	Maryland	6,795
8	Pennsylvania	5,946
9	North Carolina	5,156
	Total, All States	**154,489**

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

Note: Comparable data for FY2010 are not available.

Appendix B. DOL H-2B Labor Certifications by Occupation[111]

In FY2010, DOL approved 3,726 H-2B labor certification applications. For these applications, DOL approved requests for a total of 86,596 H-2B positions.

A majority of H-2B requests certified by DOL are for workers in a few occupations. **Table B-1** shows that in FY2010, 64.0% of certified requests were for 10 occupations. One occupation, landscape laborer, accounted for 26.8% of the total number of workers certified.

Table B-1. Number of H-2B Workers Certified by the U.S. Department of Labor, FY2010

Ranking	Occupation	Number of Workers Certified	Percent of Total Workers Certified	Cumulative Percent
1	Landscape laborer	23,210	26.8%	26.8%
2	Amusement park worker	5,974	6.9%	33.7%
3	Forest worker	5,180	6.0%	39.7%
4	Housekeeper	5,032	5.8%	45.5%
5	Industrial commercial groundskeeper	4,918	5.7%	51.2%
6	Housekeeping cleaner	3,547	4.1%	55.3%
7	Construction worker I	2,640	3.0%	58.3%
8	Waiter/waitress	1,713	2.0%	60.3%
9	Dining room attendant	1,611	1.9%	62.2%
10	Stable attendant	1,559	1.8%	64.0%
	Other	31,212	36.0%	100.0%
	Total	**86,596**	**100.0%**	

Source: Numbers compiled by CRS from H-2B employer applications for FY2010. Data are available at the U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, *H-2B Program Data*, http://www.flcdatacenter.com/CaseH2B.aspx.

[111] This appendix was prepared by Gerald Mayer, CRS Analyst in Labor Policy.

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

Table C-1. Number of H-2A and H-2B Visas Issued, FY1992-FY2011

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 (prelim.)	55,384	50,817

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

Note: Data for FY2011 are preliminary.

Appendix D. DHS and DOL Regulations on H-2A and H-2B Nonimmigrants and their Employment in the United States

H-2A Regulations: DHS

The 2008 DHS final rule on the H-2A visa made various changes to prior regulations. It modified previous limitations on an H-2A worker's period of stay in the United States. Under prior regulations, an H-2A worker who had spent three years in the United States had to remain outside the country for six months before he or she could again be granted H-2A status. The DHS rule reduced this waiting period to three months.

The DHS H-2A rule extended the period of time from 10 days to 30 days that an H-2A worker could remain in the United States after the H-2A petition expired in order to prepare to depart or to seek an extension of stay based on a subsequent job offer. In another change, the DHS rule allowed an H-2A worker who was awaiting an extension of stay based on a petition filed by a new employer (and accompanied by an approved labor certification) to begin the new job before the extension of stay was granted, provided that the new employer was a registered user in good standing of E-Verify, the electronic employment verification system administered by USCIS.[112]

The DHS rule also established new requirements under the H-2A program. It instituted a prohibition on 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. In addition, the DHS rule limited participation in the H-2A program to nationals of countries designated annually by DHS, with the concurrence of DOS.[113]

H-2A Regulations: DOL

The 2010 DOL rule on the H-2A visa reversed key changes to the H-2A labor certification process made by the 2008 rule, while retaining other changes made by that earlier rule. The 2010 rule reinstated the type of supervised labor certification process that had been in place prior to the 2008 rule's establishment of an attestation-based certification process.

Under the 2010 rule, a prospective H-2A employer must submit a job order to the state workforce agency (SWA) serving the area of intended employment before filing a labor certification

[112] For information on E-Verify, see CRS Report R40446, *Electronic Employment Eligibility Verification*.

[113] On January 18, 2012, DHS published a notice, effective that day, identifying 58 countries whose nationals are eligible to participate in the H-2A and H-2B programs in 2012. The countries are Argentina, Australia, Barbados, Belize, Brazil, Bulgaria, Canada, Chile, Costa Rica, Croatia, Dominican Republic, Ecuador, El Salvador, Estonia, Ethiopia, Fiji, Guatemala, Haiti, Honduras, Hungary, Iceland, Ireland, Israel, Jamaica, Japan, Kiribati, Latvia, Lithuania, Macedonia, Mexico, Moldova, Montenegro, Nauru, The Netherlands, New Zealand, Nicaragua, Norway, Papua New Guinea, Peru, Philippines, Poland, Romania, Samoa, Serbia, Slovakia, Slovenia, Solomon Islands, South Africa, South Korea, Spain, Switzerland, Tonga, Turkey, Tuvalu, Ukraine, United Kingdom, Uruguay, and Vanuatu. 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," 77 *Federal Register* 2558-2559, January 18, 2012. The notice discusses the factors taken into account in designating eligible countries.

application. The job order has to be submitted between 60 and 75 days before the employer's date of need for workers, and it has to include the job qualifications and requirements as well as the required minimum benefit and wage provisions. Either the SWA or DOL can require the employer to submit documentation in support of any job qualification specified in the job offer. Once reviewed and cleared by the SWA, the job order becomes the basis for recruiting U.S. workers to fill the employer's job openings. The employer then must file a labor certification application with DOL at least 45 days before the date of need. The 2010 rule further required DOL to establish an electronic registry of H-2A jobs and to post the job order on the registry once the labor certification application was accepted.

As part of the labor certification process, H-2A employers have to offer and provide required wages and benefits to H-2A workers and workers in *corresponding employment*. The 2010 rule redefined *corresponding employment* for H-2A purposes 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.

With respect to wages, the 2010 DOL rule amended existing regulations to require H-2A employers to pay their workers the highest of four wage rates: the federal or applicable state minimum wage, the prevailing wage rate,[114] the adverse effect wage rate (AEWR),[115] or the agreed-upon collective bargaining wage. The 2010 rule reversed changes made by the 2008 rule to the methodology for calculating the AEWR. It reinstated the wage requirements in effect prior to the 2008 rule, with the addition of the collective bargaining wage.[116] Explaining the addition of the collective bargaining wage, the 2010 rule stated:

> This amendment requires employers to use a collective bargaining wage if it is the highest wage, thus avoiding the potential payment of a collective bargaining wage that is less than the other wages. At the same time, it acknowledges the role of the collectively bargained wage as a potential legitimate wage.[117]

The 2010 rule also reinstated the *fifty-percent rule* in its pre-2008 rule form. The fifty-percent rule requires an H-2A employer to hire any qualified U.S. worker who applies for a position until 50% of the period of the work contract under which the H-2A workers are employed has elapsed. The 2008 rule took initial steps to phase out this requirement.

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[114] The prevailing wage rate is the average wage paid to similarly employed workers in the occupation in the area of intended employment. Prevailing wage rates are based on DOL-funded surveys conducted by the states. See archived CRS Report RL34739, *Temporary Farm Labor: The H-2A Program and the U.S. Department of Labor's Proposed Changes in the Adverse Effect Wage Rate (AEWR)*, by Gerald Mayer (hereafter cited as archived CRS Report RL34739).

[115] The AEWR is set by DOL for each state or region, based upon data gathered by the Department of Agriculture in its quarterly Farm Labor Survey. For 2012, the AEWR ranges from $9.30 for Arkansas, Louisiana, and Mississippi to $12.26 for Hawaii. 2012 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: 2012 Adverse Effect Wage Rates," 76 *Federal Register* 79711, December 22, 2011.

[116] Under pre-2008 regulations, H-2A employers were required to pay workers the highest of the federal or state minimum wage, the prevailing wage rate, or the AEWR. The 2008 rule retained this language, but changed the methodology for calculating the AEWR, which, according to DOL, had the effect of setting the AEWRs at prevailing wage rates. For a discussion of the wage provisions in the 2008 rule, see 2008 DOL H-2A rule, pp. 77167-77168, and archived CRS Report RL34739.

[117] 2010 DOL H-2A rule, p. 6901.

H-2B Regulations: DHS

DHS's 2008 rule on the H-2B visa revised prior regulations in various ways. It changed the definition of temporary employment for H-2B purposes to require the prospective H-2B employer to establish that his or her need for the worker would end in the "near, definable future." While the 2008 rule stated, as did the prior regulation, that the employer's need will generally be for a period of one year or less, it also provided that in the case of a one-time occurrence, the employer's need could last up to three years. The DOL final rule discussed above further clarified that except in the case of a one-time occurrence, an H-2B labor certification application based on an employer's need lasting more than 10 months would be denied, absent unusual circumstances.

DHS's 2008 H-2B rule further amended prior regulations to require that an employer have an approved labor certification before the employer could 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. In response to this new requirement for an approved certification, DOL established an appeals process in cases of H-2B labor certification denials.

Other changes to DHS's H-2B regulations mirrored changes to its H-2A regulations. The H-2B rule, like the H-2A rule, reduced from six months to three months the amount of time that a worker who had spent three years in the United States had to remain outside the country before he or she could again be granted H-2B status. The DHS H-2B rule instituted a prohibition on 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. DHS's H-2B rule also limited participation in the H-2B program to nationals of countries to be designated annually by DHS, with the concurrence of DOS.[118]

H-2B Regulations: DOL[119]

The 2012 rule discussed here is not in effect, as described above. The H-2B program is currently operating under the 2008 DOL final rule issued by the Bush Administration.

The 2012 DOL rule reversed changes made to the H-2B labor certification process under the 2008 rule and reinstituted a certification-based model. It also bifurcated the labor certification application process into distinct registration and application phases and revised application timetables.

[118] On January 18, 2012, DHS published a notice, effective that day, identifying 58 countries whose nationals are eligible to participate in the H-2A and H-2B programs in 2012. The countries are Argentina, Australia, Barbados, Belize, Brazil, Bulgaria, Canada, Chile, Costa Rica, Croatia, Dominican Republic, Ecuador, El Salvador, Estonia, Ethiopia, Fiji, Guatemala, Haiti, Honduras, Hungary, Iceland, Ireland, Israel, Jamaica, Japan, Kiribati, Latvia, Lithuania, Macedonia, Mexico, Moldova, Montenegro, Nauru, The Netherlands, New Zealand, Nicaragua, Norway, Papua New Guinea, Peru, Philippines, Poland, Romania, Samoa, Serbia, Slovakia, Slovenia, Solomon Islands, South Africa, South Korea, Spain, Switzerland, Tonga, Turkey, Tuvalu, Ukraine, United Kingdom, Uruguay, and Vanuatu. 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," 77 *Federal Register* 2558-2559, January 18, 2012. The notice discusses the factors taken into account in designating eligible countries.

[119] DOL's 2010 rule on H-2B employment is discussed here. DOL's 2011 H-2B wage rule is discussed in **Appendix E**.

Under the 2012 final rule, DOL must assess an employer's temporary need for H-2B workers in the registration phase. 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 could be valid for up to three years.

The labor market test is administered by DOL in the subsequent application phase to determine whether U.S. workers are available to fill the job opportunities. Under the 2008 rule, DOL made simultaneous determinations on temporary need and the labor market test. Under the 2012 rule, the employer must file the labor certification application and the job order 75 to 90 days before the date of need. The SWA is required to keep the job order open and continue referring U.S. workers for the job opportunity until 21 days before the date of the employer's need.[120] Under the 2008 rule, the SWA had to keep the job order open for at least 10 days.

Under the 2012 DOL H-2B rule, the electronic job registry that was created for posting H-2A job orders was expanded to include H-2B job orders. Under the rule, once DOL accepts the labor certification application, the job order is posted on the online registry.

The 2012 final rule made a variety of other changes to the H-2B labor certification process. The 2008 regulations provided that, except in cases of a one-time occurrence, labor certification applications with a period of employer need of more than 10 months would generally be denied. In the 2012 final rule, DOL shortened this maximum period to nine months, maintaining that this new maximum "definitively establishes the temporariness of the position, as there is an entire season in which there is simply no need for the worker(s)."[121] Along similar lines, the 2012 rule limited the 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.[122]

In addition, the 2012 rule required employers to provide workers engaged in *corresponding employment* with at least the same protections, wages, and benefits as those provided to H-2B workers. Corresponding employment, as defined under the rule, included, 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. Under the 2008 regulations, this "equal treatment" requirement was limited to workers hired in connection with an H-2B labor certification application during the prescribed recruitment period. Furthermore, the 2012 final rule required employers to pay or reimburse workers for transportation and visa costs, and to offer a three-fourths guarantee similar to that under the H-2A program, in which H-2B employers must guarantee payment of wages for at least three-fourths of the contract period.[123]

[120] Under the proposed rule that preceded the 2012 final rule, this U.S. worker recruitment period would have been longer, lasting until the later of three days before the date of need or the date the last foreign worker departed for the employment.

[121] 2012 DOL final H-2B rule, p. 10053.

[122] This restriction reflected 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.

[123] Under the 2012 H-2B final rule, the three-fourths guarantee applied in each 12-week period or in each 6-week period, depending on the length of the employment period.

Appendix E. H-2B Wage Requirements[124]

DOL H-2B Wage Rule Chronology

On October 5, 2010, DOL issued proposed regulations to change the methodology for determining the prevailing wage for H-2B workers.[125] DOL issued a final rule on January 19, 2011. The effective date of the final rule was January 1, 2012.[126]

A court ruling invalidated the January 1, 2012, effective date. Therefore, on June 28, 2011, DOL issued a proposed rule to change the effective date of the new wage methodology.[127] On August 1, 2011, DOL issued a final rule setting September 30, 2011, as the effective date for the new wage methodology.[128]

In response to two lawsuits that sought to prevent the implementation of the new wage methodology, DOL announced on September 28, 2011, that it was postponing the effective date of the new wage rule for 60 days, until November 30, 2011.[129]

On November 18, 2011, the President signed H.R. 2112, the Consolidated and Further Continuing Appropriations Act, 2012 (P.L. 112-55). The bill stated that DOL could not use funds appropriated by the act to "implement, administer, or enforce" the new wage methodology before January 1, 2012. The bill did not prevent the new wage methodology from going into effect as planned on November 30. DOL determined, however, that if the new wage methodology went into effect, it would not be able to issue wage determinations. Accordingly, the department delayed the effective date of the new methodology until January 1, 2012.[130]

On December 23, 2011, the President signed H.R. 2055, the Consolidated Appropriations Act, 2012 (P.L. 112-74). The act prevented DOL from using funds provided by the act "to implement" the new wage methodology for the remainder of FY2012. In response, DOL announced that it was postponing the effective date of the new wage methodology until October 1, 2012.[131]

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[124] This appendix was prepared by Gerald Mayer, CRS Analyst in Labor Policy.

[125] U.S. Department of Labor, Employment and Training Administration, "Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program," 75 *Federal Register* 61578-61588, October 5, 2010.

[126] U.S. Department of Labor, Employment and Training Administration, "Wage Methodology for the Temporary Non-agricultural Employment H-2B Program," 76 *Federal Register* 3452-3484, January 19, 2011.

[127] U.S. Department of Labor, Employment and Training Administration, "Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program; Amendment of Effective Date, 76 *Federal Register* 37686-37689, June 28, 2011.

[128] U.S. Department of Labor, Employment and Training Administration, "Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program; Amendment of Effective Date," 76 *Federal Register* 45667-45673, August 1, 2011.

[129] U.S. Department of Labor, Employment and Training Administration, "Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program; Postponement of Effective Date," 76 *Federal Register* 59896-59897, September 28, 2011.

[130] U.S. Department of Labor, Employment and Training Administration, "Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program; Delay of Effective Date," 76 *Federal Register* 73508-73509, November 29, 2011.

[131] U.S. Department of Labor, Employment and Training Administration, "Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program; Delay of Effective Date," 76 *Federal Register* 82115-82116, December 30, (continued...)

On September 28, 2012, the President signed H.J.Res. 117, the Continuing Appropriations Resolution, 2013 (P.L. 112-175). The act prohibits DOL from using funds to implement the new wage methodology until March 27, 2013. In response, DOL announced that it was postponing the effective date of the new wage methodology until March 27, 2013.[132]

Comparison of Wage Methodology Under Current and New DOL Regulations

Table E-1 compares the wage methodology under the current and new regulations for determining the prevailing wage for H-2B workers. The last column of the table identifies some of the changes that may affect the wages of H-2B workers.

Wage Rates Under Current Methodology

Under current regulations, DOL uses data from its Occupational Employment Statistics (OES) survey to provide four wage rates based on the level of education, experience, and supervision that the employer requires for the job. These four skill levels are labeled Level I, II, III, and IV. The Level I and IV wage levels (hourly and annual) are estimated by DOL's Bureau of Labor Statistics (BLS) directly from OES wage data. The Level I wage is the average wage for the bottom third of the earnings distribution. The Level IV wage is the average of the top two-thirds of the earnings distribution. The Level II and Level III wages are calculated from the Level I and IV wages.

To illustrate the four wage levels, assume that the Level I and Level IV hourly wages estimated from OES wage data are $10.00 and $22.00, respectively. The difference between the Level IV and Level I wage is $12.00. Dividing this difference by three and adding the result to the Level I wage yields a Level II wage of $14.00 (i.e., $12.00 ÷ 3 = $4.00. $10.00 + $4.00 = $14.00). Subtracting the result from the Level IV wage yields a Level III wage of $18.00 (i.e., $22.00 - $4.00 = $18.00).

(...continued)

2011.

[132] U.S. Department of Labor, Employment and Training Administration, "Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program; Delay of Effective Date," 77 *Federal Register* 60040-60041, October 2, 2012.

Table E-1. Current and New Regulations for Determining the Prevailing Wage for H-2B Workers

Current Regulations	New Regulations	Differences Between Current and New Regulations
Employers must pay H-2B workers *at least* the prevailing wage.	Employers must pay H-2B workers the *highest* wage from one of several sources.	Under the current wage methodology, the prevailing wage for H-2B workers can come from one of several sources. But employers do not have to pay the highest of these wage rates. Under the new wage methodology, employers will be required to pay the highest wage from one of several sources.
If the job is covered by a collective bargaining agreement, the prevailing wage is the wage that applies to the job under the agreement. Otherwise, the prevailing wage may be the wage from the U.S. Department of Labor's (DOL) Occupational Employment Statistics (OES) survey. An employer may use a wage from another acceptable survey. An employer may also choose to use the wage that would apply to the job under the Davis-Bacon Act or Service Contract Act. If the prevailing wage is based on wage data from the OES survey, DOL provides four wage rates for each occupation and area of intended employment. The wages vary according to the level of education, experience, and supervision that the employer requires for the job.	Employers are required to pay the highest of the following wages: the wage that applies to the job under a collective bargaining agreement; the wage that applies to the job under either the Davis-Bacon Act or Service Contract Act; or the average wage paid to workers employed in similar jobs in the area of intended employment as determined from DOL's OES survey.	Under the current wage methodology, DOL uses wage data from the OES survey to provide four wage rates for each job and area of intended employment. The wage rates vary depending on the level of education, experience, and supervision that the employer requires for the job. Under the new methodology, the prevailing wage from the OES survey will be the average wage for workers in the job in the area of intended employment.
If an employer chooses to use wage data from another survey (including an employer-conducted survey), the survey must be recent, cover the area of intended employment, and include jobs similar to those to be filled by the H-2B worker. The wage data must be collected using a valid statistical methodology.	Employers cannot provide their own surveys, unless there is no wage available from a collective bargaining agreement, the Davis-Bacon Act, the Service Contract Act, or the OES survey.	Under the new rule, employers will be limited in their ability to provide their own wage surveys.
The prevailing wage cannot be lower than the applicable federal or state minimum wage.	Same as current regulations.	No difference.

Sources: Information on the current regulations is from 20 C.F.R. §655.10 and U.S. Department of Labor, Employment and Training Administration, *Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs*, November 2009, http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf. Information on the new wage methodology is from U.S. Department of Labor, Employment and Training Administration, "Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program," *Federal Register*, v. 75, October 5, 2010, pp. 61578-61588. Analysis of the differences between the current and new regulations was prepared by CRS.

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