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

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Summary

Certain foreign workers, sometimes referred to as guest workers, may be admitted to the United States to perform temporary labor under two temporary worker visas: the H-2A visa for agricultural workers and the H-2B visa for nonagricultural workers. The H-2A visa is not subject to any numerical limitations, while the H-2B visa is subject to a statutory annual cap of 66,000.

H-2A and H-2B workers fill jobs that do not require much formal education. H-2A workers perform seasonal or temporary agricultural labor. They also engage in range herding and livestock production. H-2B workers perform temporary jobs in a variety of fields including landscaping, meat and seafood processing, and construction.

The H-2A and H-2B programs are administered by the Department of Homeland Security (DHS) and the Department of Labor (DOL). These agencies and the Department of State (DOS) have made adjustments, and in the case of DHS issued H-2A and H-2B temporary final rules, related to guest worker visas in response to the coronavirus pandemic.

Statutory and regulatory provisions establish processes for bringing in workers under the H-2A and H-2B programs that are intended to protect similarly employed U.S. workers. As an initial step in the process, a prospective H-2A or H-2B employer must apply for DOL labor certification to ensure that U.S. workers are not available for the jobs in question and that the hiring of foreign workers will not adversely affect the wages and working conditions of U.S. workers. After receiving labor certification, the employer can submit an application, known as a petition, to DHS to bring in foreign workers. If the petition is approved, a foreign worker who is abroad can then go to a U.S. embassy or consulate to apply for an H-2A or H-2B nonimmigrant visa from DOS. If the visa application is approved, the worker is issued a visa that he or she can use to apply for admission to the United States at a port of entry. The final steps are different if the foreign worker is already in the United States; in such a case, there is no visa application.

Over the years, a variety of legislative measures have been put forward concerning foreign temporary agricultural and nonagricultural workers. These have included bills to establish new temporary worker visas for agricultural and nonagricultural workers as well as proposals to change the existing H-2A and H-2B programs. In recent Congresses, the latter proposals have been more common. H-2A-related measures have sought to revise H-2A program requirements on temporary need, wages, U.S. worker recruitment, and housing, among other items. Recent bills on the H-2B visa have focused largely on the annual cap.

The H-2A and H-2B programs—and guest worker programs broadly—strive both to be responsive to legitimate employer needs for temporary labor and to provide adequate protections for U.S. and foreign temporary workers. There is much debate, however, about how to strike the appropriate balance between these goals. Key policy considerations for Congress include the labor market test to determine whether U.S. workers are available for the positions; required wages; and enforcement. The issue of unauthorized workers also arises in connection with guest worker programs.

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Introduction

The United States has a long history of importing foreign temporary workers who are sometimes referred to as guest workers. In the past, guest workers were used to address U.S. worker shortages during times of war. Notably, the controversial Bracero program, which began during World War II and lasted until 1964, brought several million Mexican agricultural workers into the United States.

Today, the Immigration and Nationality Act (INA)¹ provides for the temporary admission of agricultural and nonagricultural workers to the United States through the H-2A and H-2B visa programs, respectively. H-2A and H-2B workers fill jobs that do not require much formal education. H-2A workers perform seasonal or temporary agricultural labor. They also engage in range herding and livestock production. H-2B workers perform temporary jobs in a variety of fields including landscaping, meat and seafood processing, and construction. The H-2A and H-2B programs, which are subject to detailed recruitment and other requirements, seek to meet the legitimate temporary labor needs of employers while providing protections to U.S. and foreign workers.

The difficulty in balancing the needs of employers and workers in guest worker programs is reflected in ongoing debates about such programs. Some view guest worker programs as helpful to businesses with seasonal needs and “to our long-term economic health” and call for their expansion and simplification.² Others see these programs as leaving many participating workers “vulnerable to abuse and retaliation at the hands of employers and their agents.”³

In response to the Coronavirus Disease 2019 (COVID-19), the Department of State (DOS) suspended routine visa services at all U.S. embassies and consulates as of March 20, 2020.⁴ On March 23, 2020, the Department of Homeland Security (DHS) announced that it had reached agreement with Mexico and Canada to “limit all non-essential travel across borders” in an effort to slow further spread of coronavirus.⁵ Among the immigration-related issues raised by these actions was the possible impact on the admission to the United States of H-2A temporary agricultural workers and H-2B temporary nonagricultural workers (sometimes referred to collectively as H-2 workers).

In an announcement on March 26, 2020, DOS stated that “the H-2 program is essential to the economy and food security of the United States and is a national security priority” and that the department “intend[s] to continue processing H-2 cases as much as possible, as permitted by post resources and local government restrictions.” It further explained that DOS Secretary Mike Pompeo, in consultation with DHS, had “authorized consular officers to expand the categories of H-2 visa applicants whose applications can be adjudicated without an in-person interview.”

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

² See, for example, Isai Chavez, “Guest Worker Programs: What Needs Fixing and Why,” E21/Manhattan Institute for Policy Research, February 26, 2018, <https://economics21.org/html/guest-worker-programs-what-needs-fixing-and-why-2915.html>.

³ See Daniel Costa, “Modern-day Braceros,” Working Economics Blog, Economic Policy Institute, March 31, 2017, <https://www.epi.org/blog/modern-day-braceros-the-united-states-has-450000-guest-workers-in-low-wage-jobs/>.

⁴ U.S. Department of State, Bureau of Consular Affairs, “Suspension of Routine Visa Services,” March 20, 2020, <https://travel.state.gov/content/travel/en/News/visas-news/suspension-of-routine-visa-services.html>.

⁵ U.S. Department of Homeland Security, “Fact Sheet: DHS Measures on the Border to Limit the Further Spread of Coronavirus,” March 23, 2020, <https://www.dhs.gov/news/2020/03/23/fact-sheet-dhs-measures-border-limit-further-spread-coronavirus>.

According to the DOS announcement, “We anticipate the vast majority of otherwise qualified H-2 applicants will now be adjudicated without an interview.”⁶

For its part, DHS issued temporary final rules in April 2020 and May 2020 to facilitate the continued employment of H-2A temporary agricultural workers and H-2B temporary nonagricultural workers, respectively, during the COVID-19 national emergency. According to the supplementary information to the H-2A rule, “DHS is taking steps to ensure that the agricultural sector has greater certainty and flexibility to minimize gaps in their H-2A workflow” in view of COVID-19-related travel restrictions, visa processing limitations, and possible H-2A worker unavailability due to illness.⁷ The supplementary information to the H-2B rule similarly states that “DHS is taking steps to ensure that employers who have needs for temporary nonagricultural workers who provide stability to the nation’s food supply chain have greater certainty and flexibility to minimize gaps in the flow of H-2B workers.”⁸

This report covers the H-2A temporary agricultural worker program and the H-2B temporary nonagricultural worker program. It explores the statutory and regulatory provisions that govern each program, focusing in particular on the much-debated labor certification process. It also describes 2020 program changes in response to the COVID-19 pandemic. It discusses past and present legislative efforts to reform the H-2A and H-2B programs and to create new guest worker visas, and identifies and analyzes key policy considerations to help inform future congressional action.

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

The INA enumerates categories of aliens,⁹ known as nonimmigrants, who are admitted to the United States for a temporary period of time and specific purpose. Nonimmigrant visa categories are identified by letters and numbers, based on the sections of the INA that authorize them. Among the major nonimmigrant visa categories is the “H” category for temporary workers. It includes H-2A and H-2B visas for guest workers,¹⁰ as well as visas for specialty occupation workers.¹¹

The INA, as originally enacted in 1952, authorized an H-2 nonimmigrant visa category for foreign agricultural and nonagricultural workers who were coming temporarily to the United States to perform temporary services (other than those of an exceptional nature requiring distinguished merit and ability) or labor. The 1986 Immigration Reform and Control Act (IRCA)¹² 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

⁶ U.S. Department of State, Bureau of Consular Affairs, “Important Announcement on H2 Visas,” March 26, 2020, <https://travel.state.gov/content/travel/en/News/visas-news/important-announcement-on-h2-visas.html> (hereinafter cited as “DOS, “Important Announcement on H2 Visas”).

⁷ U.S. Department of Homeland Security, “Temporary Changes to Requirements Affecting H-2A Nonimmigrants Due to the COVID-19 National Emergency,” 85 *Federal Register* 21739, 21741-21742, April 20, 2020 (hereinafter cited as “2020 DHS H-2A temporary rule”).

⁸ U.S. Department of Homeland Security, “Temporary Changes to Requirements Affecting H-2B Nonimmigrants Due to the COVID-19 National Emergency,” 85 *Federal Register* 28843, 28846, May 14, 2020 (hereinafter cited as “2020 DHS H-2B temporary rule”).

⁹ An *alien* is defined in the INA as a person who is not a citizen or national of the United States. INA §101(a)(3); 8 U.S.C. §1101(a)(3).

¹⁰ INA §§101(a)(15)(H)(ii)(a), (b); 8 U.S.C. §§1101(a)(15)(H)(ii)(a), (b).

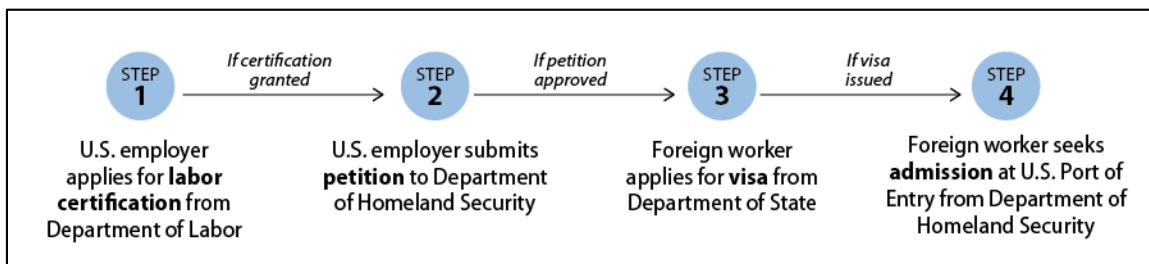
¹¹ See CRS Report R45040, *Immigration: Nonimmigrant (Temporary) Admissions to the United States*.

¹² P.L. 99-603, November 6, 1986.

for H-2A workers. The H-2A and H-2B programs are administered by DHS's U.S. Citizenship and Immigration Services (USCIS) and the Employment and Training Administration (ETA) of the Department of Labor (DOL).

While there are many differences between the H-2A and H-2B programs, the process of bringing in workers under either one entails the same basic steps (see **Figure 1**). Employers who want to hire workers through either program must first apply to DOL for labor certification. After receiving labor certification, a prospective H-2A or H-2B employer can submit an application, known as a petition, to DHS to bring in foreign workers.

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



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

If the petition 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 DOS. As part of the visa process, most applicants must be interviewed, unless the interview requirement is waived.¹³ The INA authorizes consular officers to waive nonimmigrant visa interviews in certain cases.¹⁴ It also authorizes the Secretary of State to waive visa interviews upon a determination that such a waiver is “in the national interest of the United States” or is “necessary as a result of unusual or emergent circumstances.”¹⁵ 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. If admitted, the H-2A or H-2B worker can commence employment on the work start date.

¹³ The interview requirements and waiver provisions are enumerated in INA §222(h) (8 U.S.C. §1202(h)). These provisions require interviews for nonimmigrant visa applicants between the ages of 14 and 79, but allow for waivers in certain circumstances.

¹⁴ These include cases in which the consular officer has no indication that the applicant has not complied with U.S. immigration law and regulations, the individual was previously issued a visa of the same type, the individual is applying no more than 12 months after the expiration of the prior visa, and the individual is applying from within his or her country of usual residence unless otherwise prescribed in regulations. INA §222(h)(1)(B); 8 U.S.C. §1202(h)(1)(B). In a March 2020 notice to H-2 petitioners, DOS indicated that it would continue to process H-2 cases but needed to modify procedures in light of “the social distancing recommended by health authorities” in response to COVID-19. DOS stated that it would give processing priority to “returning H-2 workers who are eligible for an interview waiver.” It described returning H-2 workers as “applicants whose H-2A or H-2B visas have expired in the last twelve months and are now applying for the same visa classification and did not require a waiver the last time they applied for a visa.” An excerpt from one of these letters is available in Ross Courtney, “Coronavirus slows H-2A visas,” *Good Fruit Grower*, March 17, 2020.

¹⁵ INA §222(h)(1)(C); 8 U.S.C. §1202(h)(1)(C). DOS’s March 26, 2020, H-2 announcement authorized consular officers “if they so choose” to consider as returning workers for purposes of a visa interview waiver H-2 applicants whose prior visas expired in the last 48 months (rather than the normal 12 months) provided that the applicants are applying for the same visa classification and did not require a waiver of ineligibility the last time. See U.S. Department of State, “Important Announcement on H2 Visas.” Also see, U.S. Department of State, U.S. Embassy and Consulates in Mexico, “Notice to H2 Agents and Petitioners,” March 26, 2020, <https://mx.usembassy.gov/notice-to-h2-agents-and-petitioners-march-26-2020/>.

The last part of the process is different if the foreign worker who the prospective H-2A or H-2B employer wants to employ is already in the United States. (There is no visa application step if the beneficiary of the petition is in the United States.) In such a case, the employer requests as part of the petition that the worker be granted an extension of stay (if the worker holds the relevant H-2A or H-2B status) or a change of status/extension of stay (if the worker is in another nonimmigrant status). If the petition is approved, the H-2A or H-2B worker can commence employment on the work start date. DHS temporary final rules, issued in spring 2020 in response to the COVID-19 emergency, enable H-2A workers and H-2B workers to commence employment before petition approval.

Temporary Labor Certification

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

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

- (1) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and at place needed, to perform the labor or services involved in the petition, and
- (2) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.¹⁶

There is no equivalent labor certification requirement in statute for the H-2B visa. The INA, however, does contain some related language. For example, it defines an H-2B alien, in relevant part, as an alien “who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country.”¹⁷ The H-2B labor certification requirement instead appears in DHS regulations, which state

The petitioner may not file an H-2B petition unless the United States petitioner has applied for a labor certification with the Secretary of Labor ... and has obtained a favorable labor certification determination.¹⁸

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

H-2A Agricultural Worker Visa

The H-2A visa allows for the temporary admission of foreign workers to the United States to perform agricultural labor or services of a seasonal or temporary nature. It is governed by

¹⁶ INA §218(a)(1)(A), (B); 8 U.S.C. §1188(a)(1)(A), (B).

¹⁷ INA §101(a)(15)(H)(ii)(b); 8 U.S.C. §1101(a)(15)(H)(ii)(b).

¹⁸ 8 C.F.R. §214.2(h)(6)(iii)(C).

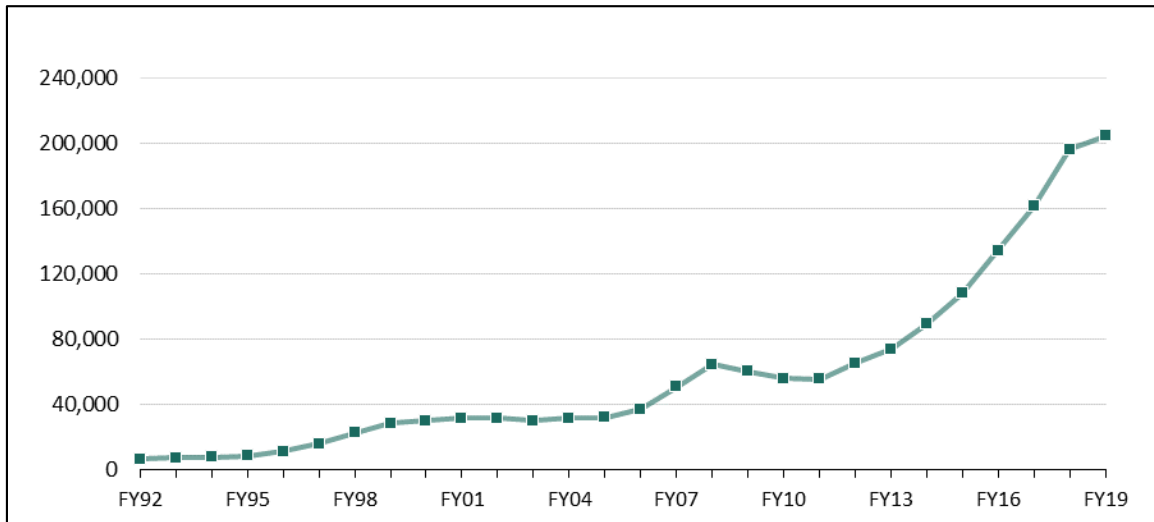
provisions in the INA and regulations issued by DHS and DOL. H-2A workers may perform agricultural work, as defined by DOL in regulations and including “agricultural labor” and “agriculture” as these terms are defined in specified laws.¹⁹ H-2A workers may also perform other specified agricultural activities, including the pressing of apples for cider.²⁰

Visa Issuances

The H-2A visa program is not subject to a statutory numerical limit and has grown significantly over the last 25 years. One way to measure the H-2A program’s growth is to consider changes in the number of H-2A visas issued annually by DOS. The visa application and issuance process occurs after DOL has granted labor certification and DHS has approved the visa petition (see **Figure 1**). As illustrated in **Figure 2**, the number of H-2A visas issued has increased relatively sharply in recent years, with visa issuances more than tripling from FY2011 to FY2019. In FY2019, H-2A visa issuances exceeded 200,000 for the first time in the program’s history.²¹

Annual visa issuances provide an approximation of the number of aliens with H-2A status that enter the United States in a given year. However, they are not a precise measure. Among the reasons for this are that not all aliens who are issued H-2A visas necessarily use them to enter the United States, and an alien with an H-2A visa may be denied admission at a U.S. port of entry.

Figure 2. H-2A Visas Issued, FY1992-FY2019



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

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

With the recent growth in H-2A visa issuances, questions have arisen about the size of the H-2A visa program relative to the larger agricultural workforce in the United States. Estimates vary depending on how the agricultural workforce is defined and the factors that are taken into account in making the comparison. Based on DOS visa issuance data and DOL data, a 2020 Economic

¹⁹ The laws are enumerated in the INA definition of an H-2A worker, INA §101(a)(15)(H)(ii)(a) (8 U.S.C. §1101(a)(15)(H)(ii)(a)).

²⁰ The pressing of apples was added to the INA definition of an H-2A worker by the FY2006 Department of Homeland Security Appropriations Act (P.L. 109-90, §536).

²¹ See **Appendix C** for annual H-2A visa issuance data.

Policy Institute piece by Daniel Costa and Philip Martin estimated that “H-2A workers filled 10% of the roughly one million full-time-equivalent jobs in U.S. crop agriculture” in FY2019.²² An earlier analysis by Martin found that H-2A workers accounted for “approximately 8 percent of average annual employment on U.S. crop farms” in FY2014.²³ One basic limitation of using annual visa issuance data as a measure of the H-2A workforce is that these data exclude some H-2A workers, such as those who enter the United States on a visa in one fiscal year and then extend their stay into the next fiscal year to perform new employment; such workers would not be included in visa issuance data for the second year.

H-2A Statutory Provisions

The H-2A visa is subject to a set of conditions and rules described in INA §218.²⁴ As illustrated in **Figure 1**, prospective H-2A employers must first apply to DOL for labor certification. To approve a labor certification application, DOL must determine that qualified U.S. workers are not available to fill the job openings and that the employment of foreign workers will not adversely affect similarly employed U.S. workers (e.g., by lowering wages).

U.S. worker recruitment is a key component of the H-2A labor certification process. As required by the INA, the prospective H-2A employer’s job offer is circulated through an interstate employment system to recruit qualified U.S. workers. The employer also may be required to engage in additional recruitment in a “multi-state region of traditional or expected labor supply.”²⁵ INA provisions on the H-2A visa include a *fifty percent rule*, under which employers are required to hire any qualified U.S. worker who applies for a position during the first half of the work contract under which the H-2A workers who are in the job are employed.²⁶

Under the INA provisions, DOL cannot require a prospective H-2A employer to submit a labor certification application more than 45 days before the employer’s date of need for workers. And if the employer has complied with the recruitment and other certification requirements and eligible U.S. workers have not been found to fill the job openings, DOL must issue a labor certification no later than 30 days before the employer’s date of need.²⁷ Among the other statutory labor

²² Daniel Costa and Philip Martin, *Coronavirus and farmworkers: Farm employment, safety issues, and the H-2A guestworker program*, Economic Policy Institute, March 24, 2020, <https://www.epi.org/publication/coronavirus-and-farmworkers-h-2a/>. According to its website, the Economic Policy Institute seeks “to include the needs of low- and middle-income workers in economic policy discussions.”

²³ Philip Martin, *Immigration and Farm Labor: From Unauthorized to H-2A for Some?* Migration Policy Institute, August 2017, pp. 8, 15 (footnote 29). Martin’s estimates are based on an analysis of DOL Bureau of Labor Statistics data. Another available source of agricultural workforce data is the U.S. Department of Agriculture’s National Agricultural Statistics Service (NASS), which reports on the average annual number of hired farm workers in the United States (excluding Alaska). These data are limited for H-2A comparison purposes in that they exclude agricultural service workers, who work on a contract or “fee for service” basis. According to NASS data, the average annual number of hired farm workers in the United States in 2019 was 702,300. U.S. Department of Agriculture, National Agricultural Statistics Service, *Farm Labor*, November 21, 2019.

²⁴ 8 U.S.C. §1188.

²⁵ INA §218(b)(4); 8 U.S.C. §1188(b)(4).

²⁶ This rule was originally made effective by law for three years beginning in 1987 but remains in place by regulation.

²⁷ DOL publishes a quarterly report on the H-2A program that includes statistics on application processing. According to the report for the fourth quarter of FY2019 (*H-2A Temporary Agricultural Labor Certification Program - Selected Statistics, FY 2019*), which includes FY2019 full-year data, DOL processed 86.1% of H-2A applications that were complete in a timely fashion (that is, it issued a final determination 30 days before the work start date) in FY2019. The quarterly reports are available on ETA’s Office of Foreign Labor Certification (OFLC) Performance Data page.

²⁷ 8 U.S.C. §1188.

certification requirements, employers must provide workers with housing in accordance with regulations.

The INA permits the filing of H-2A labor certification applications and petitions by agricultural associations.²⁸ In addition, it authorizes DOL to take actions, such as imposing penalties, to ensure employer compliance with the terms and conditions of H-2A employment.

Separate from the INA, H-2A workers are statutorily eligible for legal assistance by a Legal Services Corporation-funded program on matters arising under workers' specific employment contracts relating to wages, housing, transportation, and other employment rights.²⁹

H-2A Regulations

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

DHS Regulations on the H-2A Visa

DHS regulations govern the admission of H-2A workers to the United States.³⁰ The current DHS rule on the H-2A visa describes its purpose as being “to provide agricultural employers with an orderly and timely flow of legal workers, thereby decreasing their reliance on unauthorized workers, while protecting the rights of laborers.”³¹

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

DHS regulations limit participation in the H-2A program to nationals of countries designated annually by DHS, with the concurrence of DOS.³² The regulations also prohibit payments by prospective H-2A workers to employers, recruiters, or other employment service providers where the payments are a condition of obtaining H-2A employment.

DHS regulations also address an H-2A worker's authorized period of stay. They specify that an H-2A worker can be admitted to the United States up to one week before the start of the approved

²⁷ INA §218(b)(4); 8 U.S.C. §1188(b)(4).

²⁷ This rule was originally made effective by law for three years beginning in 1987 but remains in place by regulation.

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²⁸ For purposes of the H-2A program, an agricultural association is a nonprofit or cooperative association of farmers, growers, or ranchers that performs certain functions, such as recruiting or transporting workers.

²⁹ 45 CFR §1626.11. The underlying statutory provision is P.L. 99-603, §305.

³⁰ 8 C.F.R. §214.2(h)(5).

³¹ U.S. Department of Homeland Security, “Changes to Requirements Affecting H-2A Nonimmigrants,” 73 *Federal Register* 76891, December 18, 2008 (hereinafter cited as “2008 DSH-2A rule”).

³² DHS published a notice, effective on January 19, 2019, for one year, that identified 84 countries whose nationals are eligible to participate in the H-2A program. See U.S. Department of Homeland Security, “Identification of Foreign Countries Whose Nationals Are Eligible to Participate in the H-2A and H-2B Nonimmigrant Worker Programs,” 84 *Federal Register* 133, January 18, 2019. The notice discusses the factors considered in designating eligible countries.

H-2A petition period in order to travel to the work site and may remain in the country for 30 days after the petition expires in order to prepare to depart or to seek an extension of stay based on a subsequent job offer.³³ An employer can apply to extend an H-2A worker's stay in increments of up to one year, but an alien's total period of stay as an H-2A worker may not exceed three consecutive years. An alien who has spent three years in the United States in H-2A status may not seek an extension of his or her stay or be readmitted to the United States as an H-2A worker until he or she has been outside the country for three months.

In response to the COVID-19 emergency, DHS issued a final rule on April 20, 2020, making temporary changes to some of its H-2A regulatory requirements that will be in effect until August 18, 2020.³⁴ The rule enables H-2A workers in the United States who seek to undertake new H-2A employment to begin that work after the employer files a petition, accompanied by a valid labor certification, requesting an extension of stay for the worker (but before the petition is approved). In general, absent this change, the worker could not start the new employment until DHS approved the petition.³⁵ Under the rule, the H-2A worker would be authorized to start the new employment on the work start date in the filed petition or the acknowledged petition receipt date, whichever is later, and work for up to 45 days while the petition remains pending.³⁶

As noted, an H-2A worker is limited to a three-year maximum period of stay. The rule creates a temporary exception to this limitation. Under the rule, an H-2A petition seeking an extension of stay, accompanied by a valid labor certification, may be approved even if any of the workers requested in the petition either have already been in the United States for three years or would exceed the three-year limit if the extension were approved.

The rule, however, does not modify or waive related DOL regulations. As stated in the supplementary information to the rule, "This final rule proposes no changes to DOL's regulations or to the TLC [temporary labor certification] process, which the employer must undergo to recruit U.S. workers prior to the filing of an H-2A petition with USCIS."³⁷

DOL Regulations on H-2A Employment

DOL regulations on the H-2A visa include ETA regulations concerning H-2A labor certification.³⁸ ETA regulations implement the requirement that before an employer can petition for H-2A workers, the employer must apply for certification that U.S. workers are not available to fill the

³³ In March 2020, in response to the COVID-19 pandemic, the U.S. Department of Agriculture (USDA) and DOL announced a partnership to identify workers whose work periods are ending and who may be available to fill positions with U.S. agricultural employers. According to the announcement, "USDA and DOL have identified nearly 20,000 H-2A and H-2B certified positions that have expiring contracts in the coming weeks. There will be workers leaving these positions who could be available to transfer to a different employer's labor certification." U.S. Department of Agriculture, "USDA and DOL Announce Information Sharing to Assist H-2A Employers," March 19, 2020, <https://www.usda.gov/media/press-releases/2020/03/19/usda-and-dol-announce-information-sharing-assist-h-2a-employers>.

³⁴ 2020 DHS H-2A temporary rule.

³⁵ 8 C.F.R. 214.2(h)(2)(i)(D).

³⁶ There is a similar permanent regulatory provision that predates the temporary final rule that allows an H-2A worker to begin work with a new petitioning employer before the petition is approved if the employer participates in the E-Verify employment eligibility verification system. 8 C.F.R. §274a.12(b)(21). See 2020 DHS H-2A temporary rule, p. 21742. For information on E-Verify, see CRS Report R40446, *Electronic Employment Eligibility Verification*.

³⁷ 2020 DHS temporary H-2A rule, p. 21742.

³⁸ 20 C.F.R. Part 655, Subpart B.

positions and that the employment of foreign workers will not adversely affect the wages or working conditions of U.S. workers.

ETA regulations detail the process for prospective H-2A employers to recruit U.S. workers. The employer must submit a job order containing the terms and conditions of employment to the DOL-funded state workforce agency (SWA)³⁹ serving the area of intended employment before the employer can submit a labor certification application. The job order becomes the basis for recruiting U.S. workers to fill the employer's openings through an intrastate clearance system. Once the employer submits the labor certification application and job order to ETA and ETA determines that they are complete and comply with applicable requirements, the agency authorizes access to the interstate clearance system and posts the job order on its electronic job registry.⁴⁰ ETA also will direct the employer to conduct recruitment by other means, including by contacting former U.S. workers.

H-2A employers must offer and provide required wages and benefits to H-2A workers and workers in *corresponding employment*. Corresponding employment for purposes of the H-2A program is 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. H-2A employers are required to pay workers the highest of several wage rates (see "Wages" below). Employers must provide a *three-fourths guarantee*; that is, they must guarantee to offer workers employment for at least three-fourths of the contract period. They must also provide workers with housing, transportation,⁴¹ and other benefits, including workers' compensation insurance.⁴²

ETA regulations address circumstances in which, due to natural or manmade catastrophic events beyond the employer's control, an H-2A employer no longer needs the services of a worker. In such a case, the employer may terminate the work contract with DOL approval. However, the employer remains obligated to meet certain responsibilities to the worker.⁴³

ETA, which is responsible for enforcing H-2A employer compliance with obligations related to the labor certification process, may conduct audits of approved labor certification applications.

³⁹ A state workforce agency is a state government agency that receives funds pursuant to the Wagner-Peyser Act (29 U.S.C. §49 et seq.) to administer the state's public labor exchange activities.

⁴⁰ The registry is available at <https://seasonaljobs.dol.gov/jobs>.

⁴¹ The transportation requirement covers the H-2A worker's transportation to and from the place of employment at the beginning and end of the work contract period, respectively, and transportation between the worker's living quarters and the worksite.

⁴² H-2A workers, like nonimmigrants generally, are not eligible for federally funded public assistance, with the exception of certain emergency services. See CRS Report RL33809, *Noncitizen Eligibility for Federal Public Assistance: Policy Overview*. However, nonimmigrants are generally subject to the provisions of the Affordable Care Act (P.L. 111-148), as amended. See archived CRS Report R43561, *Treatment of Noncitizens Under the Affordable Care Act*.

⁴³ These responsibilities include fulfilling a three-fourths guarantee for the period between the contract start date and the termination date. 20 C.F.R. §655.122(o). In a March 2020 FAQ, DOL addressed the application of these DOL H-2A "contract impossibility" regulations and similar DOL H-2B regulations during the COVID-19 pandemic: "Employers who received temporary labor certification under the H-2A, H-2B, or CW-1 visa programs may request approval from the ... [ETA's Office of Foreign Labor Certification] to terminate work under the job order and/or work contracts before the end date of work due to the impact of the COVID-19 pandemic." U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, "COVID-19, Frequently Asked Questions, Round 1," March 20, 2020, p. 7, https://www.foreignlaborcert.doleta.gov/pdf/DOL-OFLC_COVID-19_FAQs_Round%201_03.20.2020.pdf.

Under certain circumstances, it may revoke an approved certification or debar an employer from receiving future certifications.

DOL regulations on the H-2A visa also include regulations by the Wage and Hour Division (WHD) concerning enforcement of contractual obligations under the H-2A program.⁴⁴ WHD is responsible for enforcing H-2A employer compliance with obligations to H-2A workers and workers in corresponding employment, such as the requirement to offer employment to U.S. workers. The agency is responsible for carrying out investigations, inspections, and law enforcement functions and in appropriate instances, imposing penalties or taking other actions, including debarment.

Range Herding and Livestock Regulations

ETA issued regulations in 2015 on range herding and livestock production that established special standards and procedures for employers applying for labor certification to hire H-2A workers to perform this type of work. These standards and procedures encompass various aspects of the labor certification process, including job order and labor certification application filing, U.S. worker recruitment, wage requirements, and housing standards.⁴⁵

H-2B Nonagricultural Worker Visa

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

H-2B workers are not limited to a particular set of occupations. Over the years, the H-2B visa has been used to bring in workers to perform a variety of jobs. According to DOL labor certification data, the top H-2B occupation in recent years in terms of the number of positions certified has been landscaping and groundskeeping worker. Other top occupations include forest and conservation worker, maid and housekeeping cleaner, amusement and recreation attendant, and meat, poultry, and fish cutter and trimmer (see **Appendix B** for data on H-2B labor certifications by occupation).

Visa Issuances

Figure 3 shows H-2B visa issuance data for FY1992 through FY2019.⁴⁶ Unlike the uncapped H-2A visa, the H-2B visa is subject to a statutory annual numerical limit of 66,000. For several years (FY2005-FY2007, FY2016), a provision was in effect that exempted certain returning H-2B workers from being counted against the statutory cap. H-2B visa issuances peaked in FY2007, totaling almost twice the cap. The number of H-2B visas issued reached a recent low point in FY2009 during the Great Recession. FY2009 was the first year since FY2002 that H-2B visa

⁴⁴ 29 C.F.R. Part 501.

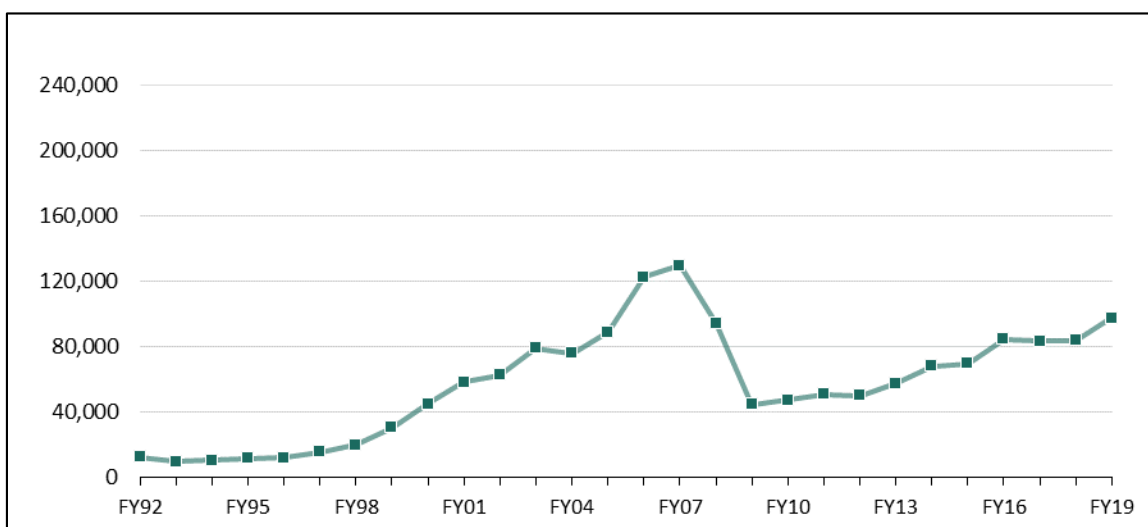
⁴⁵ U.S. Department of Labor, Employment and Training Administration, “Temporary Agricultural Employment of H-2A Foreign Workers in the Herding or Production of Livestock on the Range in the United States,” 80 *Federal Register* 62958, October 16, 2015 (hereinafter cited as “DOL H-2A herding rule”). Also see U.S. Department of Labor, Employer and Training Administration, Office of Foreign Labor Certification, “2015 Final Rule, Range Herding or Production of Livestock in the United States,” factsheet, https://www.foreignlaborcert.doleta.gov/herd_pdf/herder_factsheet.pdf.

⁴⁶ There is no precise measure available of the number of aliens with H-2B status that enter the United States in any given year. Visa data provide an approximation but are subject to limitations, including that not all aliens who are issued visas necessarily use them to enter the United States.

issuances fell below the 66,000 cap. As shown in **Figure 3**, H-2B visa issuances have followed a generally upward trend since then. For each year from FY2017 to FY2020, Congress has authorized DHS to make additional H-2B visas available (beyond the cap) subject to certain constraints. (For further information about the special H-2B cap provisions, see “Enacted Provisions” below.)

As illustrated in **Figure 3**, there are several years that H-2B visa issuances exceeded the 66,000 cap when no special H-2B cap provisions were in effect. It is not necessarily clear in such cases whether the H-2B cap was technically exceeded (and if so, by how much) in light of the cap implementation process and other factors (see “Numerical Limits” below).

Figure 3. H-2B Visas Issued, FY1992-FY2019



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

Notes: See **Appendix C** for underlying data. Special cap-related provisions were in effect for FY2005-FY2007 and FY2016-FY2019.

H-2B Statutory Provisions

The INA does not include a section detailing the conditions and rules applicable to the admission of H-2B workers as it does for H-2A workers. It does, however, place some specific requirements on H-2B employers. It requires an employer who dismisses an H-2B worker before the end of his or her period of authorized admission to pay for the worker’s return transportation abroad.⁴⁷ It also directs DHS to impose a fraud prevention and detection fee on H-2B employers.⁴⁸ The INA further authorizes DHS to enforce the conditions of an H-2B petition and allows DHS to delegate this authority to DOL, by agreement.⁴⁹ (DHS transferred this enforcement authority to DOL, effective January 18, 2009.⁵⁰)

⁴⁷ INA §214(c)(5); 8 U.S.C. §1184(c)(5).

⁴⁸ INA §214(c)(13); 8 U.S.C. §1184(c)(13). H-2B fraud prevention and detection fees are deposited into the Fraud Prevention and Detection Account, which was established in the general fund of the Treasury by INA §286(v) (8 U.S.C. §1356(v)). This account supports activities related to preventing and detecting fraud in the delivery of immigration benefits.

⁴⁹ INA §214(c)(14)(A), (B); 8 U.S.C. §1184(c)(14)(A), (B).

⁵⁰ See U.S. Department of Labor, Employment and Training Administration and Wage and Hour Division, “Labor

The INA also imposes the aforementioned statutory numerical limit on the H-2B visa, specifying that the total number of aliens who may be issued H-2B visas or otherwise provided H-2B status during a fiscal year may not exceed 66,000. It further specifies that no more than half this total (33,000) may be allocated during the first half of a fiscal year.⁵¹ A statutory provision separate from the INA establishes an H-2B cap-related exception. Enacted as part of the FY2005 Department of Defense Appropriations Act, this provision makes the cap inapplicable to an H-2B worker employed “as a fish roe processor, a fish roe technician, or a supervisor of fish roe processing.”⁵²

Temporary H-2B cap-related and other provisions have also been regularly enacted in recent years. For FY2020, language in an omnibus appropriations act provides for the issuance of H-2B visas beyond the statutory cap under certain conditions (see “Enacted Provisions”). DOL appropriations provisions address various DOL H-2B regulations. For FY2020, these provisions define temporary need and the prevailing wage for H-2B purposes, prohibit the use of funds to enact certain regulatory provisions, and allow for the staggered entry of certain H-2B workers (see “DHS/DOL Regulations on H-2B Employment”).

In addition, an FY2008 omnibus appropriations act makes H-2B forestry workers eligible, on a permanent basis, for the same Legal Services Corporation-funded legal assistance available to H-2A workers. This legal assistance may be provided to H-2B forestry workers on matters relating to wages, housing, transportation, and other employment rights arising under workers’ specific employment contracts.⁵³

H-2B Regulations

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

DHS Regulations on the H-2B Visa

DHS regulations govern the admission of H-2B workers to the United States.⁵⁴ Under DHS regulations, an H-2B worker can be admitted to the United States up to 10 days before the validity period of the H-2B petition and may remain in the country for 10 days after the petition expires. An employer can apply to extend an H-2B worker’s stay in increments of up to one year, but an alien’s total period of stay as an H-2B worker may not exceed three consecutive years.⁵⁵ 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.

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

⁵¹ INA §§214(g)(1)(B), (g)(10); 8 U.S.C. §§1184(g)(1)(B), (g)(10).

⁵² P.L. 108-287, §14006.

⁵³ P.L. 110-161, Division B, Title V, §540; 45 C.F.R. §1626.11.

⁵⁴ 8 C.F.R. §214.2(h)(6).

⁵⁵ 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.

DHS regulations define *temporary* work for purposes of the H-2B visa. For work to qualify as temporary, the employer must establish that his or her need for the worker will end in the “near, definable future.” Additionally, the employer’s need for the duties to be performed by the worker must be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need.⁵⁶ The employer’s need must generally be for a period of one year or less, but, in the case of a one-time occurrence, could last up to three years.

DHS’s H-2B regulations limit participation in the H-2B program to nationals of countries designated annually by DHS, with the concurrence of DOS.⁵⁷ These regulations also prohibit payments by prospective H-2B workers to employers, recruiters, or other employment service providers where the payments are a condition of obtaining H-2B employment.

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

The Secretary of Labor may investigate employers to enforce compliance with the conditions of a petition and Department of Labor-approved temporary labor certification to admit or otherwise provide status to an H-2B worker.⁵⁸

On May 14, 2020, DHS issued a final rule making temporary changes to some of its H-2B regulatory requirements in response to the COVID-19 emergency. This rule mirrors the H-2A rule issued in April 2020 and similarly provides a 120-day filing period for requesting its flexibilities. The rule does not apply to H-2B workers generally. Instead, it is limited to workers who perform temporary labor “essential to the U.S. food supply chain.”⁵⁹

The rule enables H-2B workers in the United States who seek to undertake new H-2B employment to begin that work after the employer files a petition requesting an extension of stay for the worker (but before the petition is approved). The petition must be accompanied by a valid labor certification and an attestation that the worker will be performing work essential to the U.S. food supply chain. In general, absent this change the worker could not start the new employment until DHS approved the petition.⁶⁰ Under the rule, the H-2B worker would be authorized to start the new employment on the work start date in the filed petition or the USCIS-acknowledged petition receipt date, whichever is later, and work for up to 60 days while the petition remains pending.⁶¹

⁵⁶ For definitions of these types of need, see 8 C.F.R. §214.2(h)(6)(ii)(B).

⁵⁷ DHS published a notice, effective on January 19, 2019, for one year, that identified 81 countries whose nationals are eligible to participate in the H-2B program. See U.S. Department of Homeland Security, “Identification of Foreign Countries Whose Nationals Are Eligible to Participate in the H-2A and H-2B Nonimmigrant Worker Programs,” 84 *Federal Register* 133, January 18, 2019. The notice discusses the factors considered in designating eligible countries.

⁵⁸ 8 C.F.R. §214.2(h)(6)(ix).

⁵⁹ According to the supplementary information to the rule, this work includes, but is not limited to, “work related to the processing, manufacturing, and packaging of human and animal food; transporting human and animal food from farms, or manufacturing or processing plants, to distributors and end sellers; and the selling of human and animal food through a variety of sellers or retail establishments, including restaurants.” 2020 DHS H-2B temporary rule, p. 28846.

⁶⁰ 8 C.F.R. 214.2(h)(2)(i)(D).

⁶¹ There is a similar permanent regulatory provision that predates the temporary final rule that allows an H-2A worker to begin work with a new petitioning employer before the petition is approved if the employer participates in the E-Verify employment eligibility verification system. 8 C.F.R. §274a.12(b)(21). Unlike the provision in the temporary final rule that allows the new employment to begin only on the petition work start date and authorizes such employment for up to 45 days, the provision for E-Verify employers enables H-2A workers to begin the new employment immediately, upon DHS receipt of the new H-2A petition, and authorizes employment for up to 120 days. For information on E-Verify, see CRS Report R40446, *Electronic Employment Eligibility Verification*.

As noted, an H-2B worker is limited to a three-year maximum period of stay. The rule creates a temporary exception to this limitation. Under the rule, an H-2B petition seeking an extension of stay for H-2B workers who are essential to the U.S. food supply chain, which is accompanied by a valid labor certification, may be approved even if any of the workers requested in the petition either have already been in the United States for three years or would exceed the three-year limit if the extension were approved.

The rule, however, does not modify or waive related DOL regulations. As explained in the supplementary information to the rule, “[T]his temporary final rule does not change applicable regulations pursuant to which employers in the United States must recruit U.S. workers before filing an H-2B petition with USCIS.”⁶² In addition, the supplementary information states that “DHS is not changing any other H-2B petition requirements or the adjudication process, including the requirement that the H-2B position qualify as temporary services or labor.”⁶³

DHS/DOL Regulations on H-2B Employment

The 2015 interim final rule on H-2B employment, which includes regulations on H-2B labor certification and enforcement, was issued jointly by DHS and DOL, rather than by DOL alone. This joint issuance came in response to litigation challenging DOL’s rulemaking authority with respect to the H-2B program. As noted, the INA does not assign DOL an explicit role in the H-2B visa program. As addressed in the supplementary information to the 2015 rule

To ensure that there can be no question about the authority for and validity of the regulations in this area, DHS and DOL (the Departments), together, are issuing this interim final rule. By proceeding together, the Departments affirm that this rule is fully consistent with the INA and implementing DHS regulations and is vital to DHS’s ability to faithfully implement the statutory labor protections attendant to the program.⁶⁴

Regulations on H-2B labor certification establish a two-part labor certification process with distinct *registration* and *application* phases.⁶⁵ In the registration phase, DOL must assess an employer’s temporary need for H-2B workers. A prospective H-2B employer is required to submit an H-2B registration 120 days to 150 days before the initial date of need for workers and must receive registration approval before filing a labor certification application. A registration approval can be valid for up to three years. (As of the date of this report, the registration process is not operational; DOL continues to make determinations about temporary need when it processes labor certification applications.)

Regarding the employer’s period of need for workers, the regulations provide that except in cases of a one-time occurrence, labor certification applications with a period of employer need of more than nine months will generally be denied. According to the supplementary information to the 2015 interim final rule, “Recurring temporary needs of more than 9 months are, as a practical matter, permanent positions for which H-2B labor certification is not appropriate.” The supplementary information also maintains that “DOL’s temporary need period [of nine months] falls comfortably within the parameters of the general ‘one year or less’ limitation contained in the DHS regulations.”⁶⁶ The regulations also limit participation of job contractors in the H-2B

⁶² 2020 DHS temporary H-2B rule, p. 28847.

⁶³ Ibid.

⁶⁴ 2015 DHS/DOL interim final H-2B rule, pp. 24045-24046.

⁶⁵ 20 C.F.R. Part 655, Subpart A.

⁶⁶ 2015 DHS/DOL interim final H-2B rule, p. 24056. Language included in annual DOL appropriations acts since FY2016, however, specifies that the definition of temporary need for H-2B purposes will be that in DHS regulations

program to cases in which they can demonstrate their own temporary need for workers, not that of their employer-clients.⁶⁷

During the labor certification application phase, as detailed in the regulations, ETA determines whether U.S. workers are available to fill the labor needs of the employer. Between 75 and 90 days before the employer's date of need for workers, a prospective H-2B employer must concurrently submit a labor certification application to ETA and a job order to the SWA serving the area of intended employment. If ETA determines that the submissions are complete and comply with applicable requirements, it will direct the SWA to place the job order into intrastate and interstate clearance and will post the job order on its electronic job registry to recruit U.S. workers.⁶⁸ ETA will also direct the employer to conduct recruitment of U.S. workers, including by contacting former U.S. workers. The employer must continue to accept referrals and applications of U.S. applicants until 21 days before the date of need.

A prospective H-2B employer must indicate the starting and ending dates of the period of need for H-2B workers. If within a season an employer has more than one date of need for workers to perform the same job, the employer must file a separate labor certification application for each date of need. The employer is not allowed to stagger the entry of H-2B workers based on one date of need. There is an exception to this staggered entry prohibition that permits an employer in the seafood industry with an approved H-2B petition to bring in the H-2B workers under that petition any time during the 120 days beginning on the employer's starting date of need. In order to bring in the workers between day 90 and day 120, though, the employer must conduct additional U.S. worker recruitment.⁶⁹

The regulations further require that employers offer and provide required wages and benefits to H-2B workers and workers engaged in *corresponding employment*. Corresponding employment for purposes of the H-2B program is the employment of non-H-2B workers by an employer that has an approved H-2B labor certification when those workers are performing either substantially the same work included in the job order or substantially the same work performed by the H-2B workers, with exceptions for certain incumbent workers.⁷⁰ H-2B employers are required to pay workers the highest of the prevailing wage rate or the federal, state, or local minimum wage.⁷¹ They must offer a *three-fourths guarantee* (similar to that under the H-2A program) that ensures payment of wages for at least three-fourths of the contract period.⁷² Among other benefits, they

(i.e., one year or less) (see "Enacted Provisions" for statutory citations).

⁶⁷ This restriction reflects a concern that job contractors often have an ongoing, permanent need for workers rather than a temporary need, as statutorily required for the H-2B visa.

⁶⁸ The registry is available at <https://seasonaljobs.dol.gov/jobs>.

⁶⁹ This staggered entry provision has also been included in annual DOL appropriations acts since FY2015 (see "Enacted Provisions" for statutory citations).

⁷⁰ Language included in annual DOL appropriations acts since FY2016 prohibits the use of funds to enforce this definition of corresponding employment (see "Enacted Provisions" for statutory citations).

⁷¹ Language included in annual DOL appropriations acts since FY2016 addresses H-2B prevailing wages (see "Enacted Provisions" for statutory citations).

⁷² Language included in annual DOL appropriations acts since FY2016 prohibits the use of funds to enforce the three-fourths guarantee rule (see "Enacted Provisions" for statutory citations). In a fact sheet originally published in April 2015, following enactment of the FY2016 appropriations act, DOL addressed the prohibitions on enforcing the definitions of the three-fourths guarantee and corresponding employment. DOL took the position that the FY2016 appropriations riders "did not vacate these regulatory provisions, and they remain in effect, thus imposing a legal duty on H-2B employers, even though the Department will not use any funds to enforce them until such time as the rider may be lifted." U.S. Department of Labor, Wage and Hour Division, *Fact Sheet #78E: Job Hours and the Three-Fourths Guarantee under the H-2B Program*, April 2015 (as updated), <https://www.dol.gov/sites/dolgov/files/WHD/>

must pay or reimburse workers for transportation costs (beyond the statutory requirements concerning early dismissal of workers) and visa costs, and they must provide workers with workers' compensation insurance.⁷³

As under the H-2A visa program, the regulations address emergency circumstances in which, due to natural or manmade catastrophic events beyond the employer's control, an H-2B employer no longer needs the services of a worker. In such cases, the employer may terminate the job order with DOL approval. However, the employer remains obligated to meet certain responsibilities toward the worker.⁷⁴

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

WHD also has enforcement responsibility under the H-2B visa program, which is detailed in regulations.⁷⁵ It enforces the rights of H-2B workers and workers in corresponding employment and the employer's obligations to H-2B and U.S. workers, such as whether employment was offered to U.S. workers. WHD is responsible for carrying out investigations, inspections, and law enforcement functions as well as, in appropriate instances, imposing penalties or taking other actions, including debarment.

Legislative Activity

Since the 1990s, a variety of legislative proposals have been put forward concerning foreign temporary agricultural and nonagricultural workers. Some of these proposals have been introduced in Congress as stand-alone bills, while others have been part of larger immigration or other measures. While most have seen no legislative action, a number of guest worker-related provisions and bills have been considered and, in some cases, enacted into law.

Major guest worker reform legislation was considered in the 113th Congress. The Senate passed a comprehensive immigration reform bill that would have established new temporary agricultural and nonagricultural worker visas, reformed the H-2B visa, and phased out the H-2A visa.⁷⁶ In

legacy/files/whdfs78e.pdf.

⁷³ H-2B workers, like nonimmigrants generally, are not eligible for federally funded public assistance, with the exception of certain emergency services. See CRS Report RL33809, *Noncitizen Eligibility for Federal Public Assistance: Policy Overview*. However, nonimmigrants are generally subject to the provisions of the Affordable Care Act (P.L. 111-148), as amended. See archived CRS Report R43561, *Treatment of Noncitizens Under the Affordable Care Act*.

⁷⁴ These responsibilities include fulfilling a three-fourths guarantee for the period between the contract start date and the termination date. 20 C.F.R. §655.20(g). In a March 2020 FAQ, DOL addressed the application of these DOL H-2B "impossibility of fulfillment" regulations and similar DOL H-2A regulations during the COVID-19 pandemic: "Employers who received temporary labor certification under the H-2A, H-2B, or CW-1 visa programs may request approval from the ... [ETA's Office of Foreign Labor Certification] to terminate work under the job order and/or work contracts before the end date of work due to the impact of the COVID-19 pandemic." U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, "COVID-19, Frequently Asked Questions, Round 1," March 20, 2020, p. 7, https://www.foreignlaborcert.doleta.gov/pdf/DOL-OFLC_COVID-19_FAQs_Round%201_03.20.2020.pdf.

⁷⁵ 29 C.F.R. Part 503.

⁷⁶ See archived CRS Report R43097, *Comprehensive Immigration Reform in the 113th Congress: Major Provisions in Senate-Passed S. 744*.

addition, the House Judiciary Committee reported a bill in the 113th Congress to establish a new H-2C agricultural worker visa to replace the H-2A visa.⁷⁷

While some Members have continued to put forward legislation to establish new temporary worker visas for agricultural and nonagricultural workers,⁷⁸ guest worker bills introduced in recent years have more commonly proposed changes to the existing visa programs. For example, recent bills on the H-2B visa have focused largely on the statutory annual cap. They include proposals to establish a permanent exemption from the H-2B cap for H-2B returning workers and to create new exemptions from the cap for H-2B workers performing certain types of work.⁷⁹

Bills on the H-2A visa introduced in recent Congresses would variously change existing H-2A requirements concerning temporary need, wages, U.S. worker recruitment, and housing, among other items.⁸⁰ One such bill—the Farm Workforce Modernization Act (H.R. 5038)—passed the House in the 116th Congress.

H.R. 5038, as passed by the House, would make significant changes to the H-2A visa. With respect to required wages, it would revise one of the applicable wage rates, the adverse effect wage rate (see “Wages”). It would establish a six-year Portable H-2A Visa Pilot Program to enable a limited number of H-2A workers to perform agricultural labor for employers who would not need to file H-2A petitions. It would also allow DHS to approve petitions for H-2A workers to perform year-round agricultural work, subject to an initial annual numerical limitation of 20,000 (see “Temporary or Seasonal Nature of Work” for related discussion).⁸¹

Enacted Provisions Since 2015

Since the 114th Congress, provisions on the H-2B visa have been regularly enacted as part of appropriations measures. One set of such provisions concerns certain H-2B regulations related to DOL labor certification. Language included in DOL appropriations acts for each year from FY2016 to FY2020 addresses the H-2B prevailing wage, requires use of the DHS regulatory definition of H-2B temporary need (i.e., one year or less), and prohibits the use of funds to enforce the definition of corresponding employment and the three-quarters guarantee rule (see “Wages” and “DHS/DOL Regulations on H-2B Employment”).⁸² In addition, DOL appropriations acts for each year from FY2015 to F2020 include “staggered entry” provisions that give employers in the seafood industry with approved H-2B petitions additional time (beyond the approved start date) to bring in workers (see “DHS/DOL Regulations on H-2B Employment”).⁸³

⁷⁷ See archived CRS Report R43161, *Agricultural Guest Workers: Legislative Activity in the 113th Congress*.

⁷⁸ See, for example, H.R. 4760 (Division A, Title II), as introduced and considered on the House floor, in the 115th Congress. H.R. 4760 would have established a new H-2C visa for temporary agricultural workers. (It was one of several bills considered on the House or the Senate floor in June 2018 that included provisions on unauthorized childhood arrivals. House floor action on H.R. 4760 is discussed in CRS Report R45995, *Unauthorized Childhood Arrivals, DACA, and Related Legislation*.) Also see S. 2827, as introduced in the 114th Congress, which proposed a new H-2C visa for nonagricultural workers.

⁷⁹ See, for example, H.R. 798 and H.R. 2658, as introduced in the 116th Congress.

⁸⁰ See, for example, H.R. 60, H.R. 1778, and H.R. 3740, as introduced in the 116th Congress.

⁸¹ In addition to making changes to the H-2A program, H.R. 5038 would establish a legalization program for unauthorized agricultural workers and would require agricultural employers to participate in an employment eligibility verification program modeled on E-Verify.

⁸² P.L. 114-113, Division H, Title I, §112, §113 (FY2016); P.L. 115-31, Division H, Title I, §112, §113 (FY2017); P.L. 115-141, Division H, Title I, §112, §113 (FY2018); P.L. 115-245, Division B, Title I, §111, §112 (FY2019); P.L. 116-94, Division A, Title I, §110, §111 (FY2020).

⁸³ P.L. 113-235, Division G, Title I, §108 (FY2015); P.L. 114-113, Division H, Title I, §111 (FY2016); P.L. 115-31,

A second set of appropriations provisions concerns the H-2B statutory cap. H-2B cap relief has taken two different forms in recent years. For FY2016, Congress enacted an H-2B returning worker exemption that provided that a returning H-2B worker who had been counted against the 66,000 cap in FY2013, FY2014, or FY2015 would not be counted again in FY2016.⁸⁴ For FY2017, FY2018, FY2019, and FY2020, Congress enacted a different type of H-2B cap-related provision.⁸⁵ These provisions authorized DHS, after consultation with DOL, to make additional H-2B visas (beyond the 66,000 cap) available in a fiscal year, subject to certain constraints, upon a determination that the needs of American businesses could not be satisfied with available U.S. workers. DHS rules implementing these provisions made 15,000 additional H-2B visas available annually for FY2017 and FY2018, and 30,000 additional H-2B visas available for FY2019.⁸⁶ For FY2020, DHS had planned to issue a rule making 35,000 additional H-2B visas available, but announced on April 2, 2020, that it was putting that rule on hold.⁸⁷

Policy Considerations

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

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.⁸⁸

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

Program Administration

Under the H-2A and H-2B programs, DOL makes determinations on labor certification applications, and DHS adjudicates nonimmigrant visa petitions (see **Figure 1**). Under the INA, as explained, prospective H-2A employers must apply to DOL for labor certification. The INA does not require DOL labor certification for the H-2B visa. Rather, it makes general reference to

Division H, Title I, §111 (FY2017); P.L. 115-141, Division H, Title I, §111 (FY2018); P.L. 115-245, Division B, Title I, §110 (FY2019); P.L. 116-94, Division A, Title I, §109 (FY2020). For additional information about the staggered entry provision, see CRS Report R44306, *The H-2B Visa and the Statutory Cap*.

⁸⁴ P.L. 114-113, Division F, Title V, §565. H-2B returning worker provisions were also enacted for FY2005, FY2006, and FY2007, but not in appropriations measures. See CRS Report R44306, *The H-2B Visa and the Statutory Cap*.

⁸⁵ P.L. 115-31, Division F, Title V, §543 (FY2017); P.L. 115-141, Division M, Title II, §205 (FY2018); P.L. 116-6, Division H, Title I, §105 (FY2019); P.L. 116-94, Division I, Title I, §105 (FY2020).

⁸⁶ For additional information about the FY2017, FY2018, and FY2019 statutory provisions and related implementing rules, see CRS Report R44306, *The H-2B Visa and the Statutory Cap*.

⁸⁷ According to the tweet announcing the change, “DHS’s rule on the H-2B cap is on hold pending review due to present economic circumstances. No additional H-2B visas will be released until further notice.” Quoted in Suzanne Monyak, “DHS Halts Extra Guestworker Visas As Unemployment Jumps,” *Law360*, April 2, 2020.

⁸⁸ U.S. Department of Labor, Employment and Training Administration and Wage and Hour Division, “Temporary Non-Agricultural Employment of H-2B Aliens in the United States,” *76 Federal Register* 15129, 15133, March 18, 2011 (hereinafter cited as “2011 DOL proposed H-2B rule”) (see **Appendix D**).

“consultation with appropriate agencies of the Government” as part of the process of adjudicating petitions for “H” and other specified nonimmigrants.⁸⁹ The requirement for H-2B labor certification by DOL is established by regulation. The supplementary information accompanying the current 2015 DHS/DOL interim final rule on H-2B employment includes the following rationale for DOL’s labor certification role:

DOL is the appropriate government agency with expertise in labor questions and historic and specific expertise in addressing labor protection questions related to the H-2B program. This advice helps DHS fulfill its statutory duty to determine, prior to approving an H-2B petition, that unemployed U.S. workers capable of performing the relevant service or labor cannot be found in the United States.⁹⁰

Over the years, regulatory and legislative proposals have sought to establish new agency roles in administering guest worker programs. For example, H-2B rules proposed in 2005 by DHS and DOL would have eliminated DOL’s labor certification role in the interest of efficiency. Under this proposal, which was ultimately withdrawn in the face of opposition, employers would have applied directly to DHS for H-2B workers and would have included certain labor attestations with their applications.⁹¹ Under some more recent proposals for new guest worker programs, such as that included in H.R. 4760, as considered on the House floor in the 115th Congress, employers likewise would have applied directly to DHS.⁹²

H.R. 4760 also envisioned a new role for the U.S. Department of Agriculture (USDA) in its proposed agricultural worker program. USDA would have been charged with ensuring employer compliance with program requirements. Some past and present legislative measures to reform the H-2A program have proposed reassigning DOL’s administrative responsibilities to USDA.⁹³

Labor Market Test

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

⁸⁹ INA §214(c)(1); 8 U.S.C. §1184(c)(1).

⁹⁰ 2015 DHS/DOL interim final H-2B rule, p. 24045.

⁹¹ See U.S. Department of Homeland Security, “Petitions for Aliens To Perform Temporary Nonagricultural Services or Labor (H-2B),” 70 *Federal Register* 3984, January 27, 2005; U.S. Department of Labor, Employment and Training Administration and Wage and Hour Division, “Post-Adjudication Audits of H-2B Petitions in All Occupations Other Than Excepted Occupations in the United States,” 70 *Federal Register* 3993, January 27, 2005. Under this proposal, DOL would have conducted post-certification audits.

⁹² H.R. 4760, Division A, Title II. The temporary agricultural worker program provisions in H.R. 4760 were also included in H.R. 4092, as ordered to be reported in the 115th Congress.

⁹³ See, for example, H.R. 5795, as introduced in the 116th Congress, and H.R. 281 and H.R. 641, as introduced in the 115th Congress.

The nature of the labor market test was 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 2015, which are now in effect. The 2008 DOL rules for both programs changed the traditionally supervised labor certification process into an attestation-based certification process (see **Appendix D**). In the supplementary information to 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.”⁹⁴

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

[T]here are insufficient worker protections in the current attestation-based model in which employers merely assert, and do not demonstrate, that they have performed an adequate test of the U.S. labor market and one which is in accordance with the regulations.⁹⁵

Legislative guest worker proposals continue to incorporate various forms of labor attestation. In some cases, they seek to replace existing labor certification requirements with labor attestation requirements, while generally retaining the current two-stage process in which employers first test the labor market and then, after receiving certification, petition for guest workers.⁹⁶ Other measures represent a greater departure from the current system in proposing to eliminate the current labor certification application step and to incorporate labor attestation requirements into the process of petitioning for guest workers.⁹⁷

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 specified levels. The particular wage requirements, which vary by program, are in regulation.⁹⁸ Under the H-2A program, employers must pay their workers the highest of the federal or applicable state minimum wage rate, the applicable prevailing wage rate,⁹⁹ the adverse effect wage rate (AEWR),¹⁰⁰ or the agreed-upon collective bargaining wage rate. Under the H-2B program, employers must pay their workers the highest of the federal, state, or local minimum wage or the prevailing wage rate.

⁹⁴ U.S. Department of Labor, Employment and Training Administration and Wage and Hour Division, “Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement,” 73 *Federal Register* 8538, 8542, February 18, 2008.

⁹⁵ 2011 DOL proposed H-2B rule, p. 15132 (see **Appendix D**).

⁹⁶ See, for example, H.R. 281, as introduced in the 115th Congress.

⁹⁷ See, for example, S. 792, as introduced in the 115th Congress.

⁹⁸ 20 C.F.R. §655.120, §655.12(l) (H-2A); 20 C.F.R. §655.20(a) (H-2B).

⁹⁹ In general, the prevailing wage rate is the average wage paid to similarly employed workers in an occupation in an area of intended employment.

¹⁰⁰ The AEWR is equal to the annual weighted average hourly wage for field and livestock workers combined in a state or region, as published annually by the U.S. Department of Agriculture.

Wage requirements have been a key area of controversy about the H-2A and H-2B programs. The 2015 DHS/DOL interim final rule on H-2B wages was issued following years of court challenges and congressional objections to earlier regulations.¹⁰¹ Regarding H-2B wage requirements, provisions included in annual DOL appropriations acts since FY2016 mandate that the prevailing wage for H-2B purposes be the greater of the actual wage paid by the employer to other employees with similar experience and qualifications for the position in the same location, or the prevailing wage level for the occupational classification in the applicable geographic area. The appropriations language further requires DOL to accept a private wage survey for determining the prevailing wage unless “the methodology and data in the provided survey are not statistically supported” (see “Enacted Provisions” for statutory citations).

Policy differences about H-2A wage requirements center on the AEW; the H-2A visa is the only nonimmigrant visa subject to it. A single AEW is set annually for each state or region based on data from USDA’s Farm Labor Survey.¹⁰² Farm labor advocates have argued that the AEW 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 AEW results in inflated wage rates.

Legislative proposals over the years to reform the H-2A program or establish new agricultural guest worker programs have often included provisions to eliminate the use of the AEW or effectively redefine it. In the 116th Congress, House-passed H.R. 5038 proposes to calculate separate AEWs for individual occupational classifications, preferably by state or region if such data are reported.¹⁰³ The bill also includes provisions to limit annual AEW increases and decreases. A fact sheet on H.R. 5038 describes the impact of moving to a system of occupation-specific AEWs: “This will ensure that wage requirements better reflect the real-world wages paid to specific types of workers. Some workers would see higher wages (machine operators), while others would see lower wages (crop workers).”¹⁰⁴

¹⁰¹ U.S. Department of Homeland Security and U.S. Department of Labor, Employment and Training Administration and Wage and Hour Division, “Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program,” 80 *Federal Register* 24145, April 29, 2015 (hereinafter cited as “2015 DHS/DOL final H-2B wage rule”). For a discussion of the controversy surrounding this rule, see pp. 24146-24154. The content of this rule is beyond the scope of this report.

¹⁰² For 2020, the AEW ranges from \$11.71 for Alabama, Georgia, and South Carolina, to \$15.83 for Oregon and Washington State. The 2020 AEWs 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: 2020 Adverse Effect Wage Rates for Non-Range Occupations,” 84 *Federal Register* 69774, December 19, 2019.

¹⁰³ A 2019 DOL proposed rule on H-2A employment would revise the H-2A wage requirements to similarly establish AEWs by agricultural occupation, although the particulars of the AEW changes in the proposed rule and House-passed H.R. 5038 differ. The proposed rule would also modify the methodology used to determine H-2A prevailing wages. U.S. Department of Labor, Employment and Training Administration and Wage and Hour Division, “Temporary Agricultural Employment of H-2A Nonimmigrants in the United States,” 84 *Federal Register* 36168, July 26, 2019. For information about other components of the proposed rule, see **Appendix D**.

¹⁰⁴ See *Farm Workforce Modernization Act*, <https://lofgren.house.gov/sites/lofgren.house.gov/files/Bipartisan%20Farm%20Workforce%20Modernization%20Act%20-%20One%20Pager.pdf>.

Temporary or Seasonal Nature of Work

The H-2A and H-2B programs are, by definition, limited to temporary or seasonal work.¹⁰⁵ They are intended to meet employers' temporary—and not permanent—needs for labor when U.S. workers cannot be found.

This “temporary or seasonal” requirement places restrictions on both programs. With respect to the H-2A program, it means that the program cannot be used to meet employers' year-round agricultural labor needs absent a statutory provision. There is a long-standing exception to this year-round restriction for herding on the range.¹⁰⁶ 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 INA provisions of the H-2A visa.¹⁰⁷ Other legislative proposals would more broadly amend the statutory definition of the H-2A visa to eliminate the requirement that H-2A nonimmigrants perform work “of a temporary or seasonal nature.”¹⁰⁸ H.R. 5038, as passed by the House in the 116th Congress, takes a more incremental approach. It would permit a limited number of H-2A workers (initially capped at 20,000 per year) to perform year-round employment, with a set aside for dairy work.

Under the H-2B program, as described, the employer's need for the duties to be performed by the worker must be a one-time occurrence, seasonal need, peakload need, or intermittent need. Some proposals in past Congresses would have broadened the H-2B visa from a category restricted to temporary need to one covering “short-term” labor.¹⁰⁹ This change, which was not enacted, would have permitted H-2B workers to fill a wider range of job openings.

Numerical Limits

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

¹⁰⁵ The INA definition of the H-2A nonimmigrant category generally requires the agricultural work to be “of a temporary or seasonal nature” (INA §101(a)(15)(H)(ii)(a); 8 U.S.C. §1101(a)(15)(H)(ii)(a)), and the INA definition of the H-2B nonimmigrant category requires the performance of nonagricultural “temporary service or labor” (INA §101(a)(15)(H)(ii)(b); 8 U.S.C. §1101(a)(15)(H)(ii)(b)). In the case of both the H-2A and H-2B visas, this temporary nature-of-the-work requirement is separate from and in addition to the requirement that workers must be coming for a temporary period of time.

¹⁰⁶ Herding activities are not mentioned in the INA definition of the H-2A nonimmigrant category. However, according to DOL, the inclusion of herding, specifically sheepherding, in the H-2A program has a statutory basis: “Shepherders ... 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].” See U.S. Department of Labor, Employment and Training Administration and Wage and Hour Division, “Temporary Agricultural Employment of H-2A Aliens in the United States,” 75 *Federal Register* 6884, 6891, February 12, 2010 (hereinafter cited as “2010 DOL H-2A rule”). For many years, DOL sub-regulatory guidance (special procedures) governed the labor certification process for occupations in sheep and goat herding and range production of livestock. In 2015, DOL published a final rule to establish a single set of regulations for H-2A employment in these occupations (see ““Range Herding and Livestock Regulations”).

¹⁰⁷ See, for example, H.R. 1778, as introduced in the 116th Congress.

¹⁰⁸ See, for example, H.R. 60, as introduced in the 115th Congress.

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

employment and petitions filed for fish roe workers and supervisors (see “H-2B Statutory Provisions”).¹¹⁰

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

When calculating the numerical limitations ... for a given fiscal year, USCIS will make numbers available to petitions in the order in which the petitions are filed. USCIS will make projections of the number of petitions necessary to achieve the numerical limit of approvals, taking into account historical data related to approvals, denials, revocations, and other relevant factors. USCIS will monitor the number of petitions (including the number of beneficiaries requested when necessary) received and will notify the public of the date that USCIS has received the necessary number of petitions (the “final receipt date”).¹¹¹

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

It can be difficult to estimate in advance how many beneficiaries of an H-2B petition approved by USCIS will actually seek H-2B status or eventually be issued an H-2B visa by the Department of State (DOS).¹¹²

If USCIS accepts more petitions than necessary, the H-2B cap can be exceeded. In at least one year (FY2015), however, USCIS initially accepted too few petitions and had to briefly reopen the window for accepting cap-subject H-2B petitions.¹¹³

In years when the demand for H-2B visas exceeds the supply, there is pressure to admit additional H-2B workers. Temporary statutory provisions have been enacted to allow for the admission of additional H-2B workers (beyond the 66,000 cap) every year since FY2016 (see “Enacted Provisions” above). These provisions permit the admission of increased numbers of H-2B workers, while leaving the statutory annual 66,000 limit in place.

Treatment of Family Members

The INA allows for the admission to the United States of the spouses and minor children of foreign workers on H-2A, H-2B, and other “H” visas who are accompanying or following to join the worker. These family members are issued H-4 visas and do not count against the numerical cap, if any, on the relevant temporary worker visa (such as the H-2B visa). Allowing for the admission of guest workers’ spouses and minor children enables families to stay together. On the other hand, this practice has been faulted for decreasing incentives for guest workers to return home after their authorized period of stay. Some legislative proposals to establish new guest worker programs would have explicitly prohibited family members from accompanying or following to join principal aliens.¹¹⁴

¹¹⁰ For additional information, see CRS Report R44306, *The H-2B Visa and the Statutory Cap*.

¹¹¹ 8 C.F.R. §214.2(h)(8)(ii)(B).

¹¹² U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, “USCIS to Reopen H-2B Cap for the Second Half of Fiscal Year 2015,” June 5, 2015, <https://www.uscis.gov/news/alerts/uscis-reopen-h-2b-cap-second-half-fiscal-year-2015>.

¹¹³ See CRS Report R44306, *The H-2B Visa and the Statutory Cap*.

¹¹⁴ See, for example, H.R. 4760 (Division A, Title II), as introduced in the 115th Congress.

Enforcement

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

take such actions, including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be necessary to assure employer compliance with terms and conditions of employment.¹¹⁵

More limited language added to the INA in 2005 applies to the H-2B program. These provisions authorize the Secretary of Homeland Security to impose administrative remedies and to deny certain petitions filed by an employer if the Secretary finds “a substantial failure to meet any of the conditions of the [H-2B] petition” or “a willful misrepresentation of a material fact in such petition.”¹¹⁶ As discussed, the Secretary of Homeland Security has delegated this enforcement authority to the Secretary of Labor in accordance with an agreement between the two agencies. The Secretary of Labor subsequently delegated this authority to WHD, which is now responsible for assuring employer compliance with the terms and conditions of H-2B employment.¹¹⁷

Another enforcement-related question concerns what type of mechanism, if any, ensures that guest workers do not remain in the United States beyond their authorized period of stay and become part of the unauthorized population. Among the related regulatory provisions currently in effect are provisions establishing notification requirements for H-2A and H-2B employers. DHS regulations on the H-2A visa and the H-2B visa require petitioners to notify DHS within two work days when an H-2A or H-2B worker fails to report at the start of the employment period, absconds¹¹⁸ 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.¹¹⁹ In the case of the H-2B visa, DHS explained the purpose of these notification requirements as enabling the agency

to keep track of H-2B workers while they are in the United States and take appropriate enforcement action where DHS determines that the H-2B workers have violated the terms and conditions of their nonimmigrant stay.¹²⁰

Other suggestions that have been offered to help ensure that temporary workers depart at the end of their authorized period of stay include involving the workers’ home countries in guest worker programs. Another idea is to create an incentive for foreign workers to leave the United States at the appropriate time by, for example, withholding earnings or otherwise setting aside a sum of money for each worker that would only become available once the worker returned home.¹²¹

¹¹⁵ INA §218(g)(2); 8 U.S.C. §1188(g)(2).

¹¹⁶ INA §214(c)(14)(A); 8 U.S.C. §1184(c)(14)(A).

¹¹⁷ U.S. Department of Labor, Office of the Secretary, Secretary’s Order 01–2014, 79 *Federal Register* 77527, December 24, 2014. For an evaluation of federal enforcement of H-2A and H-2B program laws and regulations, see U.S. Government Accountability Office, *H-2A and H-2B Visa Programs: Increased Protections Needed for Foreign Workers*, GAO-15-154, March 2015.

¹¹⁸ *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).

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

¹²⁰ U.S. Department of Homeland Security, “Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers,” 73 *Federal Register* 78104, 78116, December 19, 2008 (hereinafter cited as “2008 DHS H-2B rule”).

¹²¹ See, for example, H.R. 4760 (Division A, Title II), as introduced in the 115th Congress.

Unauthorized Workers

The H-2A and H-2B visa programs account for a fraction of all the workers in the United States performing the type of agricultural and nonagricultural work covered by these visas.

Unauthorized workers comprise a sizeable percentage of workers in some related industries and occupations. For example, according to Pew Research Center estimates, unauthorized workers held about a quarter of farming jobs and 15% of construction jobs in 2016.¹²²

Policymakers have periodically considered establishing a statutory mechanism to grant permanent immigration status to unauthorized or authorized guest workers. Historically, these discussions have focused on agricultural workers, and in some past and present legislative measures, guest worker reform provisions have been paired with programs to grant permanent immigration status. For example, along with its agricultural guest worker provisions, the comprehensive immigration reform bill passed by the Senate in 2013 proposed a two-stage agricultural worker legalization program, through which farm workers who had performed a requisite amount of agricultural work and satisfied other requirements could have obtained legal temporary resident status (termed “blue card” status). After meeting additional agricultural work and other requirements, these workers could have applied for lawful permanent resident (LPR) status. (Unauthorized workers and H-2A workers would have been eligible for this program.)¹²³

More recently, in the 116th Congress, House-passed H.R. 5038 would establish a two-stage legalization program for unauthorized agricultural workers to first obtain legal temporary certified agricultural worker (CAW) status and then LPR status, subject to work and other requirements at each stage. Alternatively, H.R. 5038 would permit workers to remain in CAW status indefinitely (without ever applying for LPR status) provided they continued to perform a requisite amount of agricultural work annually. This “indefinite temporary status” option distinguishes H.R. 5038 from the 2013 Senate bill and other past agricultural legalization measures that treated the legal temporary status as a way station to LPR status and limited how long an individual could remain in that temporary status. In addition, H.R. 5038 includes provisions not included in earlier agricultural legalization measures to enable an H-2A worker who had performed a threshold amount of H-2A work in each of 10 years to self-petition for LPR status.

Conclusion

Many policymakers assert that the H-2A and H-2B visa programs are not adequately meeting employers’ labor needs and/or are not adequately protecting U.S. and foreign workers, although their particular criticisms vary widely. In past years, proposed solutions have taken the form of reforms to the H-2A and H-2B visas as well as new guest worker visa programs. In the current climate, pursuing reforms to existing visa programs seems to be the course more policymakers are likely to follow. It remains unclear whether and how the COVID-19 pandemic may affect future guest worker-related legislative efforts.

¹²² Jeffrey S. Passel and D’Vera Cohn, *U.S. Unauthorized Immigrant Total Dips to Lowest Level in a Decade*, Pew Research Center, November 27, 2018. The report estimates that in 2016 there were 7.8 million unauthorized aliens in the civilian labor force, representing 4.8% of the total.

¹²³ Sections 2211-2212 of S. 744, as passed by the Senate in the 113th Congress. For further information about this proposal and other proposals, see archived CRS Report R43161, *Agricultural Guest Workers: Legislative Activity in the 113th Congress*.

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

Table A-1. Top 10 States Granted H-2A Labor Certifications: FY2018 and FY2019
Rankings based on number of positions certified

Ranking	FY2018		FY2019	
	State	Positions Certified	State	Positions Certified
1	Georgia	32,364	Florida	33,598
2	Florida	30,462	Georgia	29,480
3	Washington	24,862	Washington	26,226
4	North Carolina	21,794	California	23,321
5	California	18,908	North Carolina	21,605
6	Louisiana	10,079	Louisiana	10,816
7	Michigan	8,359	Michigan	9,096
8	New York	7,634	Kentucky	8,315
9	Kentucky	7,604	New York	8,104
10	Arizona	7,497	South Carolina	6,082
Total, All States		242,762	Total, All States	257,667

Source: CRS presentation of data from U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, *H-2A Temporary Agricultural Labor Certification Program - Selected Statistics, FY 2018*, and *H-2A Temporary Agricultural Labor Certification Program - Selected Statistics, FY 2019*.

Table A-2. Top 10 States Granted H-2B Labor Certifications: FY2018 and FY2019
Rankings based on number of positions certified

Ranking	FY2018		FY2019	
	State	Positions Certified	State	Positions Certified
1	Texas	20,443	Texas	16,106
2	Florida	10,690	Colorado	6,943
3	Colorado	7,556	Florida	5,768
4	Louisiana	5,341	North Carolina	5,074
5	Pennsylvania	5,216	Pennsylvania	5,006
6	Virginia	5,173	Louisiana	4,924
7	North Carolina	5,129	Alaska	4,892
8	South Carolina	4,984	New York	4,590
9	New York	4,579	Virginia	4,165
10	Maryland	4,439	Maryland	4,022
Total, All States		147,592	Total, All States	150,465

Source: CRS presentation of data from U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, *H-2B Temporary Non-Agricultural Labor Certification Program - Selected Statistics, FY 2018*, and *H-2B Temporary Non-Agricultural Labor Certification Program - Selected Statistics, FY 2019 EOY*.

Appendix B. H-2B Certifications by Occupation

In FY2019, DOL approved 7,377 H-2B labor certification applications. As part of these applications, DOL approved 150,465 requests for H-2B positions.

Typically, a majority of H-2B requests certified by DOL are for workers in a few occupations. In FY2019, as shown in **Table B-1**, 79% of certified positions were in 10 occupations. One occupation, landscaping & groundskeeping worker, accounted for 44% of the total number of H-2B positions certified.

Table B-1. Number of Certified H-2B Positions by Occupation, FY2019

Ranking	Occupation	Number of Workers Certified	Percentage of Total Workers Certified	Cumulative Percentage
1	Landscaping & groundskeeping worker	66,151	44.0%	44.0%
2	Forest & conservation worker	11,283	7.5%	51.5%
3	Maid & housekeeping cleaner	9,869	6.6%	58.1%
4	Meat, poultry & fish cutter and trimmer	8,486	5.6%	63.7%
5	Amusement & recreation attendant	8,014	5.3%	69.0%
6	Waiter & waitress	4,104	2.7%	71.7%
7	Construction laborer	3,369	2.2%	73.9%
8	Cook, restaurant	3,299	2.2%	76.1%
9	Laborer & Material Mover	2,274	1.5%	77.6%
10	Nonfarm animal caretaker	2,226	1.5%	79.1%
	Other	31,390	20.9%	100.0%
	Total	150,465	100.0%	

Source: CRS presentation of data from U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, *H-2B Temporary Non-Agricultural Labor Certification Program - Selected Statistics, FY 2019 EOY*.

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

Table C-1. Number of H-2A and H-2B Visas Issued, FY1992-FY2019

Fiscal Year	H-2A Visas Issued	H-2B Visas Issued
1992	6,445	12,552
1993	7,243	9,691
1994	7,721	10,400
1995	8,379	11,737
1996	11,004	12,200
1997	16,011	15,706
1998	22,676	20,192
1999	28,568	30,642
2000	30,201	45,037
2001	31,523	58,215
2002	31,538	62,591
2003	29,882	78,955
2004	31,774	76,169
2005	31,892	89,135
2006	37,149	122,541
2007	50,791	129,547
2008	64,404	94,304
2009	60,112	44,847
2010	55,921	47,403
2011	55,384	50,826
2012	65,345	50,009
2013	74,192	57,600
2014	89,274	68,102
2015	108,144	69,684
2016	134,368	84,627
2017	161,583	83,600
2018	196,408	83,774
2019	204,801	97,623

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

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

H-2A Rules

The H-2A visa program is governed mainly by a DHS final rule issued in 2008 and a DOL final rule issued in 2010. A 2019 DOL final rule made some additional changes to the labor certification process. A 2019 DOL proposed rule would make major changes to the certification process. In addition, a 2020 DHS final rule makes temporary changes to some DHS regulatory requirements in response to the COVID-19 emergency (for a discussion of these 2020 temporary changes, see “DHS Regulations on the H-2A Visa”).

Background

In 2008, during the George W. Bush Administration, DHS and DOL published final rules to significantly amend their respective H-2A regulations.¹²⁴ The agencies issued these rules to streamline the H-2A program in the aftermath of unsuccessful congressional efforts to enact comprehensive immigration reform legislation with guest worker provisions.

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

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

The Department, upon due consideration, believes that the policy underpinnings of the 2008 Final Rule, e.g. streamlining the H-2A regulatory process to defer many determinations of program compliance until after an Application has been fully adjudicated, do not provide an adequate level of protection for either U.S. or foreign workers.¹²⁵

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

¹²⁴ 2008 DHS H-2A rule; U.S. Department of Labor, Employment and Training Administration and Wage and Hour Division, “Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement,” 73 *Federal Register* 77110, December 18, 2008.

¹²⁵ U.S. Department of Labor, Employment and Training Administration and Wage and Hour Division, “Temporary Agricultural Employment of H-2A Aliens in the United States,” 74 *Federal Register* 45906, 45908, September 4, 2009.

2019 DOL Final and Proposed Rules

A 2019 DOL H-2A rule made a few changes to the labor certification process.¹²⁶ It eliminated a regulatory requirement that a prospective H-2A employer advertise its job opportunity in a print newspaper as part of its required recruitment activities. At the same time, it added a new regulatory provision allowing the ETA officer making a determination on an H-2A labor certification application, where appropriate, to direct the SWA to notify organizations that provide employment and training services about the job opportunity. Under the rule, DOL also enhanced the publicly available electronic job registry (<https://seasonaljobs.dol.gov/jobs>) where it posts approved H-2A job orders to recruit U.S. workers.¹²⁷

A 2019 DOL proposed rule would make more fundamental changes to the H-2A program.¹²⁸ It would further amend ETA regulations on the labor certification process and would amend WHD regulations on the enforcement of H-2A employers' contractual obligations. Among the major regulatory changes included in the rule, DOL proposes to revise the methodologies used to determine two wage rates relevant to the H-2A program: the AEW and the prevailing wage rate (see "Wages"). The rule would also expand the definition of *agriculture* for H-2A purposes to encompass reforestation and pine straw activities.

Under the proposed rule, H-2A employers would be permitted to stagger the entry of H-2A workers, allowing them to bring the workers into the United States at any time during the first 120 days after the date of need in the approved labor certification.¹²⁹ DOL also proposes to replace the existing fifty percent rule with a new 30-day rule. As discussed, the fifty percent rule requires an H-2A employer 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. Under DOL's replacement 30-day rule, an H-2A employer would be required to hire any qualified U.S. worker who applies for a job until 30 calendar days after the employer's first date of need on the approved labor certification. Special requirements would apply to employers who stagger the entry of H-2A workers.

H-2B Rules

The H-2B visa program is governed mainly by a DHS final rule issued in 2008 and a DHS/DOL interim final rule issued in 2015. A DHS/DOL final rule issued in 2015 revised the methodology for calculating prevailing wage rates under the H-2B program. In addition, a DHS/DOL rule issued in 2019 made some changes to the H-2B labor certification process.¹³⁰ Also, a 2020 DHS final rule makes temporary changes to some DHS regulatory requirements in response to the

¹²⁶ U.S. Department of Labor, Employment and Training Administration and Wage and Hour Division, "Modernizing Recruitment Requirements for the Temporary Employment of H-2A Foreign Workers in the United States," 84 *Federal Register* 49439, September 20, 2019.

¹²⁷ As explained in the supplementary information to the rule, "[DOL] will enhance the functional capabilities of this registry so that it also serves as a job search website that broadly advertises and disseminates H-2A job opportunities to U.S. workers." *Ibid.*, p. 49444.

¹²⁸ U.S. Department of Labor, Employment and Training Administration and Wage and Hour Division, "Temporary Agricultural Employment of H-2A Nonimmigrants in the United States," 84 *Federal Register* 36168, July 26, 2019.

¹²⁹ A staggered entry provision that applies to H-2B employers in the seafood industry is discussed in "DHS/DOL Regulations on H-2B Employment."

¹³⁰ U.S. Department of Labor, Employment and Training Administration and Wage and Hour Division, "Modernizing Recruitment Requirements for the Temporary Employment of H-2B Foreign Workers in the United States," 84 *Federal Register* 62431, November 15, 2019.

COVID-19 emergency (for a discussion of these 2020 temporary changes, see “DHS Regulations on the H-2B Visa”).

Background

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 2008. Under the DOL H-2B rule, which streamlined the labor certification process, determinations about H-2B program compliance were made only after a labor certification application had been adjudicated.

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

[I]n the first year of the operation of the attestation-based system our experience indicates that employers are attesting to compliance with program obligations with which they have not complied, and that employers do not appear to be recruiting, hiring and paying U.S. workers, and in some cases the H-2B workers themselves, in accordance with established program requirements.¹³¹

DOL issued an H-2B final rule in 2012 that required employers to show compliance with recruitment and other requirements in advance of DOL making a determination on the labor certification application.¹³² This rule, however, never became operative due to court action. A key issue in the litigation was whether DOL had the authority to promulgate regulations for the H-2B program (see “DHS/DOL Regulations on H-2B Employment”). In April 2015, DOL and DHS jointly issued two H-2B rules: an interim final rule on H-2B employment that was “virtually identical” to the DOL 2012 final rule,¹³³ and a companion final rule on prevailing wage rates under the H-2B program.

2019 DOL Final Rule

A 2019 DHS/DOL H-2B final rule made changes to the H-2B labor certification process that were analogous to some of the changes the 2019 DOL H-2A final rule made to the H-2A certification process.¹³⁴ Like the H-2A rule, the 2019 H-2B rule eliminated a regulatory requirement that a prospective H-2A employer advertise its job opportunity in a print newspaper. DOL also indicated that it would post H-2B job opportunities on the same expanded electronic job registry used to advertise H-2A jobs, as discussed above.

¹³¹ 2011 DOL proposed H-2B rule, p. 15132.

¹³² U.S. Department of Labor, Employment and Training Administration and Wage and Hour Division, “Temporary Non-Agricultural Employment of H-2B Aliens in the United States,” 77 *Federal Register* 10038, February 21, 2012.

¹³³ 2015 DHS/DOL interim final H-2B rule, p. 24043.

¹³⁴ U.S. Department of Labor, Employment and Training Administration and Wage and Hour Division, “Modernizing Recruitment Requirements for the Temporary Employment of H-2B Foreign Workers in the United States,” 84 *Federal Register* 62431, November 15, 2019.

Author Information

Andorra Bruno
Specialist in Immigration Policy

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