May, 2011

A Season of Change: Reforming the H2B Guest Worker Program

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Available at: https://works.bepress.com/jayesh_rathod/13/
Each year, as spring and summer arrive, Americans partake in a range of seasonal traditions: beautifying their lawns and gardens; enjoying harvests of fresh fruits, vegetables, and seafood; and attending local fairs and festivals. Although these rituals have become part of the American cultural fabric, few know that they are supported by thousands of temporary guest workers who enter the United States each year under the H-2 visa program. The H-2 program allows U.S. employers to petition for seasonal agricultural workers (via the H-2A program) and seasonal nonagricultural workers (via the H-2B program) to work in this country on a temporary basis. In recent years worker advocates and government representatives have drawn attention to the H-2B program’s deficiencies that contribute to the isolation and exploitation of migrant workers. Indeed, the systemic flaws of the H-2B program, inconsistent wage and hour protections, and limited access to legal services have conspired to render H-2B workers especially vulnerable to mistreatment.


Although these concerns continue to be the focus of the H-2B program, change may be imminent. In March 2011, the U.S. Department of Labor proposed revisions of the regulations that govern the H-2B program. These proposals—which offer strengthened protections for H-2B workers—are likely to spark vigorous debate among government officials, employer representatives, and worker advocates in the months to come.

Until these regulations are finalized, the program will continue to operate in its current form. Under these regulations, up to 66,000 H-2B visas may be issued each year. Two industries that rely heavily on this pool of workers—and where evidence of mistreatment has surfaced—are the traveling carnival industry and the seafood industry of the mid-Atlantic region. In the paragraphs that follow, I examine, drawing upon specific examples from these two industries, the multiple concerns about the H-2B program. I analyze how the proposed H-2B regulations meet these program-related concerns, if at all. I also recommend ways for poverty lawyers to assist H-2B workers, notwithstanding the current or future state of program regulations. I close by calling upon advocates to support broad-based reforms to enhance the rights and protections afforded to this important segment of the U.S. workforce.

The H-2B Program: Complex Processes, Structural Flaws

Many seasonal industries in the United States recruit and employ foreign workers under the auspices of the H-2B guest worker program. Employers that intend to participate in the program must take multiple steps. Before submitting any applications, employers must attempt to recruit U.S. workers to fill the positions. Employers must submit to the local state workforce agency—usually a state-level department of labor—a "job order" specifying certain employment terms and conditions, including the wage rate, job location, hours of work, and expected start and end dates. Employers must also attempt to recruit workers via advertisements in a local newspaper. If the local recruitment efforts are unsuccessful, the employer may then submit to the Labor Department an Application for Temporary Employment Certification, signaling the number of workers needed and giving information about the employer, the job, and the recruitment efforts made. Upon review, the Labor Department approves or "certifies" the application, denies the application, or issues a partial certification. With a Labor Department certification in hand, employers must submit a Petition for Nonimmigrant Worker to U.S. Citizenship and Immigration Services, a division of the U.S. Department of Homeland Security.
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The petition must indicate the number of visas sought and reaffirm the temporary nature of the employment. Homelnd Security apportions the 66,000 H-2B visas available each year. As this process moves forward within the United States, employers simultaneously identify foreign workers from certain countries, often with the assistance of a local labor recruiter in the migrant-sending state. Once the workers are identified, and the Homeland Security petition is approved, the workers eventually appear for a visa interview with the U.S. Department of State in their country of origin. The visas, issued by a U.S. consulate, allow the workers to travel to the United States to commence their work.

Thus employers and workers who seek to avail themselves of the program must interface with three federal agencies: the Labor Department, Homeland Security, and the State Department. With three separate agencies involved, workers or their representatives may be confused about which agency is responsible for specific oversight and enforcement functions. For example, H-2B workers in their countries of origin might direct wage-related complaints to the State Department (via the consulates) when the Labor Department handles the matters in question. Current regulations are noticeably silent about where to lodge program-related complaints, and whether such complaints are shared across agencies. Alongside this broad structural concern, flaws in the internal architecture of the H-2B program make the guest workers even more vulnerable. One fundamental flaw is that H-2B workers are effectively tied to single employers who control the workers’ employment and immigration status. Because of this lack of “portability,” a worker in an abusive working environment has little choice but to endure the mistreatment or leave employment.

When the worker leaves the employ of the petitioning company, the worker’s lawful immigration status in the United States soon comes to an end. Although the H-2B regulations contemplate the possibility of changing employers, the process is so cumbersome that most workers would be unable to navigate it alone. The proposed H-2B regulations do not remedy this core structural flaw.

Workers may be inhibited by the lack of portability of H-2B visas from raising complaints for fear of jeopardizing their status; they endure difficult working conditions instead. For example, in the traveling carnival industry, H-2B workers suffer verbal abuse, racial slurs, confiscation of their passports, restricted freedom of movement, and deplorable living conditions. One H-2B carnival worker was told to sleep outdoors on a piece of cardboard under the ride that he operated; the same worker was charged a $5 fee to use a nearby shower because the employer had not made housing arrangements.

20 The U.S. Department of Homeland Security periodically publishes a list of countries whose nationals are eligible to participate in the H-2B program. Nationals of the following countries may receive H-2B visas: Argentina, Australia, Barbados, Belize, Brazil, Bulgaria, Canada, Chile, Costa Rica, Croatia, Dominican Republic, Ecuador, El Salvador, Estonia, Ethiopia, Fiji, Guatemala, Honduras, Hungary, Ireland, Israel, Jamaica, Japan, Kiribati, Latvia, Lithuania, Macedonia, Mexico, Moldova, Nauru, The Netherlands, Nicaragua, New Zealand, Norway, Papua New Guinea, Peru, Philippines, Poland, Romania, Samoa, Serbia, Slovakia, Slovenia, Solomon Islands, South Africa, South Korea, Tonga, Turkey, Tuvalu, Ukraine, United Kingdom, Uruguay, and Vanuatu.
21See also American Federation of Labor–Congress of Industrial Organizations et al., Response to the Office to Monitor and Combat Trafficking in Persons, U.S. Department of State, 10 (March 26, 2010), http://bit.ly/eOB5c.
22 Id.
have been threatened with deportation after raising concerns about their working conditions.\textsuperscript{18}

Another core concern about the H-2B program is the limited oversight over the actions of local recruiters in the workers’ countries of origin. Employers typically rely upon these recruiters to identify workers and to facilitate visa issuance overseas. Local recruiters often hail from the same regions or communities as the workers themselves. As gatekeepers to potentially lucrative employment in the United States, the recruiters wield substantial power over would-be migrants. Recruiters commonly charge workers recruitment fees, despite laws that forbid such payments.\textsuperscript{19} Moreover, some recruiters and their employer-partners have been accused of human trafficking.\textsuperscript{20}

With its proposed changes in the H-2B regulations, the Labor Department affirms the need for greater information and transparency about the actions of foreign labor recruiters. The new regulations would require employers to “provide a copy of all agreements with any agent or recruiter whom it engages or plans to engage in the international recruitment of H-2B workers...” A list of these recruiters would be made available to the public.\textsuperscript{21} Moreover, an employer would have to prohibit recruiters from “seek[ing] or receiv[ing] payments or other compensation from prospective workers.”\textsuperscript{22} This prohibition would be incorporated into the written agreements between employers and recruiters.\textsuperscript{23}

Concerns about the H-2B program are not limited to lack of portability or abuse in recruitment. Even at the level of basic terms of employment, the rights of H-2B workers are limited. These limited rights are notable, particularly when compared with the benefits and protections afforded to H-2A agricultural workers. For example, H-2A workers are promised a “three-fourths guarantee,” under which employers promise paid hours equivalent to three-fourths of the work days specified in the employment contract.\textsuperscript{24} By contrast, H-2B workers are not guaranteed a certain number of hours of work, despite job descriptions required to specify work hours and days.\textsuperscript{25} For workers engaged in seasonal work that is inherently variable, the lack of an enforceable guarantee is troubling. In the seafood industry, for example, a small harvest during parts of the season may leave workers without any income. Former crab workers have reported stretches of time when they worked only a few hours per day.\textsuperscript{26}

\textsuperscript{18}Id. at 9.


\textsuperscript{22}Id.

\textsuperscript{23}Id. at 15186.

\textsuperscript{24}Id.

\textsuperscript{25}20 C.F.R. § 655.122(h)(1).

\textsuperscript{26}Id. § 655.17(f). Some local recruiters may also promise workers certain numbers of hours in order to entice them to accept H-2B jobs (see Southern Poverty Law Center, supra note 1, at 10.

\textsuperscript{27}American University Washington College of Law & Centro de los Derechos del Migrante, Picked Apart: The Hidden Struggles of Migrant Worker Women in the Maryland Crab Industry 24 (2010), http://bit.ly/Eb24t. Similar variations in hours are bound to occur in the landscaping industry or others that are weather-dependent.
With its proposed regulations, the Labor Department has taken a significant step by recommending that a version of the three-fourths guarantee be extended to H-2B workers. (The H-2B proposal differs slightly from the H-2A program guarantee: the former would impose a minimum guarantee of hours for each four-week period, whereas the H-2A guarantee is based upon the entire contract period.) In making this recommendation, the Labor Department cites the circumstances of Maryland crab workers and other H-2B workers who could not cover basic expenses when work hours were scarce.

Another disparity between the H-2A and H-2B programs relates to the provision of and payment for housing. Under the H-2A programs, employers are required to provide housing and may not charge rent to the workers. By contrast, H-2B workers have no right to employer-paid housing. While some H-2B workers are employed in metropolitan areas, many (such as crab workers) are in extremely isolated areas or (such as fair workers) move between locales. In these industries, workers have few options other than housing that is owned or managed by their employers. That H-2B workers reside abroad makes coordination difficult even if independent housing were available. These factors put workers in a delicate position of relying on their employers not only for income and immigration status but also for shelter.

H-2B workers who reside in employer-provided housing pay rent to their employers either directly or through paycheck deductions. Workers report a broad range of housing conditions—from clean and commodious rooms to quarters that are barely habitable. Former H-2B carnival workers, for example, reported unsanitary, cramped housing in trailers infested with insects. H-2B crab pickers in Maryland described different housing-related concerns, such as overcrowding and structures in disrepair. Regardless of the housing conditions, the H-2B workers often continue to pay rent out of their own pockets.

Although these structural limitations are daunting, U.S. advocates can adopt different strategies in dealing with the forms of worker mistreatment described above. Certainly advocates can comment on the proposed H-2B regulations under review. Other legal strategies can yield meaningful improvements for H-2B workers. Advocates may wish to examine state or local housing codes and potentially involve the agencies overseeing the conditions of rental housing. When evidence of recruitment abuse and gross mistreatment emerges, advocates should explore labor trafficking claims, which can include civil relief and immigration status in the form of a T-1 visa. Another creative strategy—for advocates of two or more workers seeking to bring about a change in their working conditions and, as a result, facing some form of adverse action—is to advance an unfair labor practice charge before the National Labor Relations Board. And advocates might seek information about employers’ policies and procedures through Freedom of Information Act requests. While pursuing these kinds of cases on
behalf of individual workers would probably be impracticable, advocates could use these strategies to obtain systemic data about how the H-2B program operates and better understand the program oversight role(s) undertaken by Homeland Security, the Labor Department, and the State Department.

Wage and Hour Protections: Signs of Improvement

The collision of state and federal wage laws, along with H-2B program regulations, generates a complex set of issues relating to wage structure and payment for H-2B workers. Recent efforts to enhance wage protections through regulatory processes and the courts have met with mixed success.

Under Labor Department regulations, H-2B workers must be paid the highest of the following: the local minimum wage, the state minimum wage, the federal minimum wage, or a Labor Department–determined prevailing wage. The prevailing wage is “the average wage paid to similarly employed workers in a specific occupation in the area of intended employment.” The Labor Department recently ruled on the methodology for determining the prevailing wage for H-2B workers. The new rule, which requires the Labor Department to adopt the highest of four potential wage sources, will result in higher wages for some H-2B occupations. Although the prevailing wage established a floor for the workers’ wage rates, some H-2B workers are exempt from state minimum wage protections and therefore unable to enjoy a potentially higher wage. In the Maryland crab industry, for example, H-2B crab pickers are exempt from state minimum wage and overtime protections. Consequently, during years when the state minimum wage rises above the prevailing wage, the H-2B workers are cut off from the additional wage benefit.

Beyond the wage rate itself, as noted above, current Labor Department regulations do not provide H-2B workers with any enforceable guarantees of hours. Although H-2B workers sign a “contract” that specifies the hours and weeks of work, the terms of this “job order” are not enforceable. Recent efforts by advocates to enforce these representations as contractual guarantees have been largely unsuccessful. In Garcia v. Frog Island Seafood Incorporated a court found that H-2B crab workers in North Carolina had no contractual guarantee of hours, notwithstanding the employers’ representation to the Labor Department about hours of work during the certification process. Similarly in Olvera-Morales v. International Labor Management Corporation Incorporated the court emphasized that an H-2B worker “has no employment contract or work guarantee.” Although these court decisions are discouraging, the proposed “three-fourths guarantee” for the H-2B program would significantly enhance the wage and hour protections for H-2B workers.

3620 C.F.R. § 655.22(e).
39Under the new rule the prevailing wage is the highest of a wage rate set forth in a collective bargaining agreement, if applicable; a local wage rate established under the Davis-Bacon Act or the McNamara-O’Hara Service Contract Act; or the arithmetic mean of the wages of similarly situated workers, as determined by the Bureau of Labor Statistics in its Occupational Employment Statistics wage survey (Id. at 3484). In its final rule the Labor Department reflected employers’ articulated concerns and acknowledged that the “new wage methodology may result in wages in excess of anticipated labor costs” (Id. at 3462).
40Under Maryland state law, workers who are “engaged in canning, freezing, packing or first processing ... [of] seafood” are exempt from minimum wage and overtime protections (Md. Code Ann., Lab. & Empl. § 3-403(a)(10) (LexisNexis 2011)).
Advocates have also made significant headway in ensuring that employers bear the responsibility for certain preemployment expenses. Under the Fair Labor Standards Act, expenses for goods or services that are "primarily for the benefit and convenience of the employer" may not be counted towards a worker’s minimum wage.44 Through a series of influential cases, worker advocates successfully made the case that certain preemployment expenses borne by H-2B workers operate as de facto deductions; these expenses must be reimbursed to the extent that they bring the worker’s earnings for the first week of employment below the minimum wage.45 In Arriaga v. Florida Pacific Farms the Eleventh Circuit adopted this rationale in the context of transportation and visa costs for H-2A farmworkers.46 Several years later advocates sued the Brickman Group, a prominent landscaping company, for unlawfully requiring H-2B workers to bear the burden of certain preemployment expenses.47 In ruling on the parties’ motions for summary judgment, the court extended Arriaga to the H-2B context and held that transportation, visa, and recruitment costs were primarily for the benefit and convenience of the employer.48

After these opinions were issued, in late 2008, during the twilight of the George W. Bush administration, the federal government issued regulations that essentially overturned the holdings in Arriaga and Rivera.49 The government reasoned, in essence, that the expenses in question equally benefited the employer and the employee.50 In August 2009 the Labor Department reversed course and expressed support for the Arriaga and Rivera standards.51 With its proposed regulations, the Labor Department has solidified its position on this issue: employers must be required to bear the cost of “inbound and outbound transportation, subsistence, visa, visa processing, border crossing, and related fees.”52

Advocates who encounter H-2B workers should inquire about preemployment expenses to determine whether Arriaga-type claims can be advanced. Although this topic has proven controversial, and contrary precedent does exist, recent victories highlight the possibility of recovery for these expenses.53 Even if the three-fourths guarantee is extended to the H-2B program, advocates should examine the full spectrum of arguments under the Fair Labor Standards Act and corollary state laws regarding unpaid minimum wage, unpaid overtime, and unlawful deductions during the period of employment.54

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44 Arriaga, 305 F.3d at 1237–47.
46 Id., at *50.
48 Id. at 78040.
52 Under the proposed regulations, employers would be required to "provide workers with all tools, supplies, and equipment needed to perform the job at no cost to the employee" (Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 76 Fed. Reg. at 15142).
Limited Access to Justice

Regrettably many H-2B workers whose rights are violated do not have access to legal services. Under current regulations, H-2B guest workers are not entitled to receive legal services from entities funded by the Legal Services Corporation (LSC). In 2008 advocates were able to make the case that forestry workers should be allowed representation. Apart from this small carve-out, most H-2B workers may not be represented by an LSC entity, even when it is the sole provider in a geographic area. Indeed, access to justice for these workers is further restricted by their geographical isolation.

Even if workers are fortunate enough to identify affordable legal services, they are inhibited from presenting claims. Many H-2B workers incur enormous debts to participate in the H-2B program, particularly when they must bear the burden of recruitment, transportation, and other costs. Their ability to pay off those debts often depends on their ongoing participation in the H-2B program and completion of the season’s work. Even when their rights are violated in the United States, scarce employment opportunities back home lead them to return to the H-2B program year after year. Workers who advance formal claims may risk not getting rehired for subsequent seasons.

In light of these constraints local networks of service providers may wish to identify strategies to provide services to H-2B workers. Although LSC-funded entities may not formally represent H-2B workers, their staff members may work in concert with fellow nonprofit organizations, members of the private bar, law school clinics, nonlegal professionals, and members of the community for enhanced support to guest worker communities. In the Washington, D.C., metropolitan area this type of coalition has begun to meet the legal needs of H-2B guest workers. Such a coalition can also support legislative efforts to eliminate LSC restrictions on the representation of H-2B guest workers.

Toward Strengthened Protections for H-2B Workers

The structural flaws in the H-2B program should spur attorneys seeking justice for H-2B workers to engage in reform efforts at the federal level. In recent years lawmakers in Congress have introduced bills intended to reform the H-2B program. In the 111th Congress Zoe Lofgren (D-Cal.) introduced the H-2B Program Reform Act of 2009, which sought to strengthen protections for H-2B and U.S. workers, and to codify some aspects of Arriaga. In the Senate Bernie Sanders (I-Vt.) introduced the Increasing American Wages and Benefits Act of 2010, designed to curb abusive behavior of local labor recruiters by requiring greater accountability. Thus far, however, these and other H-2B reform bills have failed to gain any legislative traction.

While new legislation may be an optimal solution, any substantive changes in the program will likely occur through the regulatory process. As the review of the H-2B regulations moves forward in the coming months, poverty lawyers should engage in the process and share their perspectives with the Labor Department during any public comment period. Advocates may ultimately overcome some of the structural challenges that have beleaguered carnival workers, seafood workers, and many other H-2B migrants.

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56 In its proposed regulations the Labor Department emphasizes that employers may not retaliate against workers who have filed complaints or sought legal assistance (see Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 76 Fed. Reg. at 15185).
