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August 9, 2006

Hon. Howard P. "Buck" McKeon, Chair  
Committee on Education and the Workforce  
U. S. House of Representatives  
2181 Rayburn House Office Building  
Washington, D.C. 20515

Hon. George Miller  
Ranking Democratic Member  
Committee on Education and the Workforce  
2101 Rayburn House Office Building  
Washington, DC 20515

Re: July 19, 2006. Hearing on "Guest Worker Programs: Impact on the American Workforce and U.S. Immigration Policy"

Dear Representatives McKeon and Miller:

I had been contacted by Committee staff as to availability to testify at the July 19, 2006 Hearing on "Guest Worker Programs: Impact on the American Workforce and U.S. Immigration Policy." I did not appear and testify at that hearing, but have requested an opportunity to supplement the excellent testimony before the full Committee by attorney Rebecca Smith of the National Employment Law Project.

I would request that the record for that hearing be supplemented with the attached testimony.

Very truly yours,

A handwritten signature in cursive script that reads "Arthur N. Read".

Arthur N. Read

# **Statement on H-2B Temporary Worker Program**

**Arthur N. Read, General Counsel  
Friends of Farmworkers, Inc.**

## **Supplementation of Testimony for July 19, 2006 Hearing on**

### **"Guest Worker Programs: Impact on the American Workforce and U.S. Immigration Policy"**

This statement is offered as a supplement to the excellent testimony of attorney Rebecca Smith of the National Employment Law Project before the full committee on July 19, 2006 during the hearing on "Guest Worker Programs: Impact on the American Workforce and U.S. Immigration Policy."

I have been the General Counsel of Friends of Farmworkers, Inc. in Pennsylvania since 1982 and involved in representation of workers since 1976. I have been heavily involved in issues involving the H-2B program since 1999. Because of the restrictions on programs which receive Legal Services Corporation funding against representing such H-2B workers, there are only a small number of legal advocates for such workers with extensive experience with issues arising under the H-2B program.

#### **Congress Should Take Concrete Steps to Improve the H-2B Program**

The purpose of this supplemental testimony is to emphasize the need for the Congress in the context of pending legislative proposals such as H.R. 4740<sup>1</sup> affecting the existing H-2B temporary non-agricultural worker program<sup>2</sup> to *immediately* address critical deficiencies in the

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<sup>1</sup> Pending before the House Committee on the Judiciary is H.R.4740 entitled: "To extend the termination date for the exemption of returning workers from the numerical limitations for temporary workers." Similarly, pending before the Senate Committee on the Judiciary is S.2284 which is identical in text. Although this legislation is likely to result in Congressional action before the end of the federal fiscal year, it fails to address deficiencies in the regulation of the H-2B program.

In 2005 Congress enacted the "Save Our Small and Seasonal Businesses Act of 2005" ("SOS Act"), as Title IV (sections 401-07) of the REAL ID Act of 2005, which is division B of Public Law 109-13, the "Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief." This was signed into law by President Bush on May 11, 2005.

That legislation which expires on October 1, 2006 exempted returning H-2B workers who had worked in any of the previous three fiscal years from the cap on the number of visas for such workers set forth in Section 214(g) of the Immigration and Nationality Act, 8 U.S.C. §1184(g).

<sup>2</sup> 8 U.S.C. §1101 (a)(15)(H)(ii)(b) covers an alien "...having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other [non-agricultural] temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country."

regulation of the H-2B program. It is likely that the proposals reflected in H.R.4740 will be attached to other legislation in the near future. Rather than simply responding to the request of industry interests to extend the exemption for returning H-2B workers on the cap on the number of H-2B workers,<sup>3</sup> Congress should couple this extension with reforms to the H-2B program to bring its protections in line with the minimal protections afforded to H-2A agricultural workers.

The United States Custom and Immigration Service describes the H-2B visa program as:

“The H-2B visa category allows U.S. employers in industries with peak load, seasonal or intermittent needs to augment their existing labor force with temporary workers. The H-2B visa category also allows U.S. employers to augment their existing labor force when necessary due to a one-time occurrence which necessitates a temporary increase in workers. Typically, H-2B workers fill labor needs in occupational areas such as construction, health care, landscaping, lumber, manufacturing, food service/processing, and resort/hospitality services.”<sup>4</sup>

Although much of the public and legislative debate over immigration reform has focused on whether new “guestworker” programs should be included in a package of comprehensive immigration reform, virtually no attention has been paid to the existing H-2B temporary worker program. That program has quietly expanded to a major degree with virtually no attention to the operation of the program.

Furthermore, as attorney Rebecca Smith noted in her July 19, 2006 testimony to this Committee:

Portability. One of the primary problems with guestworker systems is that a guestworker’s job AND his or her ability to remain in the country depend on remaining in the good graces of the employer. This is a situation made for employers who would take advantage of workers. Along with beefed up enforcement of wage and hour laws, workers must have the ability to change jobs in order to equalize bargaining power.

That problem remains fundamental to the H-2B program and can only be addressed by Congressional action.<sup>5</sup>

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<sup>3</sup> Section 214(g) of the Immigration and Nationality Act, 8 U.S.C. §1184(g) established a cap of 66,000 H-2B workers. It is likely that in excess of 87,000 returning H-2B workers were exempt from that cap during the current fiscal year under the SOS Act. See, page CRS-6 of Attachment 1 hereto discussed below at footnote 7.

<sup>4</sup> See: <http://www.uscis.gov/graphics/services/tempbenefits/cap.htm>.

<sup>5</sup> An H-2B worker who enters the United States on a valid H-2B visa apparently in practice must leave the country to apply for an H-2B visa to work with a different employer. This practice is particularly problematic for workers who are hired for very short term H-2B jobs and those whose employment with an employer ends sooner than the period for which they were recruited.

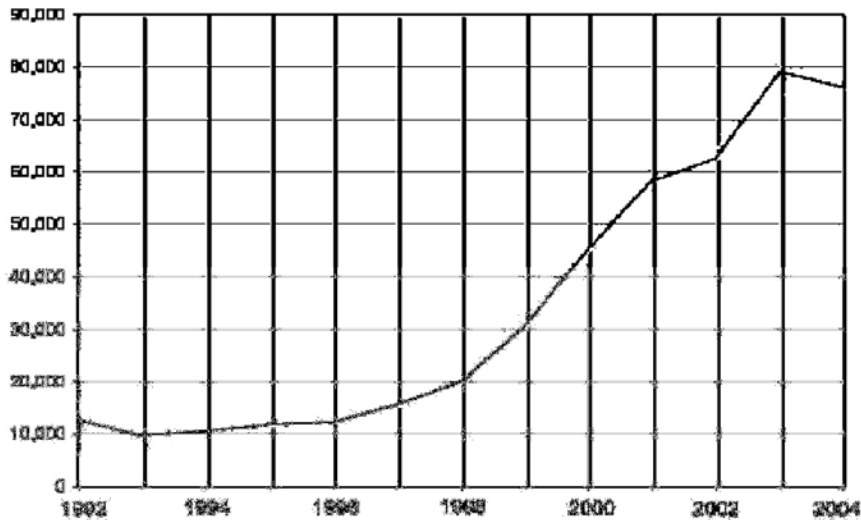
Our office has had experience with H-2B employers who were sufficiently undercapitalized that they ceased business operations shortly after H-2B workers arrived for employment leaving the workers with significant debts incurred to obtain the employment.

## The H-2B Program Has Grown in Size With No Oversight

The H-2B visa program was created by the Immigration Reform and Control Act of 1986 (IRCA) at the time the agricultural H-2A program was created from the former H-2 program.<sup>6</sup> As will be discussed in more detail below the U.S. Department of Labor, Employment and Training Administration which is responsible for labor certification decisions under the H-2A and H-2B program has completely failed to develop substantive regulations for the administration of the H-2B program. The program was not used extensively in the first 10 years after passage of the IRCA, but that has changed in the last several years.

Annexed hereto are extensive extracts from a recent report by the Congressional Research Service<sup>7</sup> discussing the quantitative and qualitative growth in both the H-2A and H-2B temporary worker programs. The following chart is reproduced from that report to illustrate the growth of the H-2B program.

**Figure 2. H-2B Visas Issued, FY1992-FY2004**



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

See, Figure 2 from Congressional Research Service Report, Attachment 1 at page CRS-5.

The quantitative data in the report on the recent growth of the H-2B program is particularly important, because that data is not readily publicly available from the Department of State which actually issues the H-2B visas each year. The report indicated that according to

<sup>6</sup> For a discussion of this issue, see Daniel E. Lungren, "The Immigration Reform and Control Act of 1986," 24 San Diego Law Review 277, 295-297 (1987).

<sup>7</sup> See, Andorra Bruno, Specialist in Social Legislation Domestic Social Policy Division, Congressional Research Service, The Library of Congress, *Immigration: Policy Considerations Related to Guest Worker Programs* (January 2006) Order Code RL32044, available at: <http://fpc.state.gov/documents/organization/62664.pdf>. A 10 page extract from that report is included as Attachment 1.

preliminary data 87,492 H-2B visas were issued in FY2005 and that in FY1993 only 9,691 H-2B visas were issued. That is a growth of more than 800%.

The program undoubtedly continued to grow significantly during FY2006 since this was the first full fiscal year in which returning H-2B workers from 2003, 2004 and 2005 were eligible to return without regard to the previous statutory cap of 66,000 workers. In theory depending on the number of returning H-2B workers the total number of H-2B workers during the current fiscal year could exceed 150,000 persons.<sup>8</sup>

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<sup>8</sup> The U.S. Department of Labor, Employment Training Administration, Office of Foreign Labor Certification has compiled in database format summary information about applications to the U.S. Department of Labor for H-2B workers. Data since FY2000 is now available in computer readable format on the DOL website at: <http://www.flcdatacenter.com/CaseH2B.aspx>. Similar computer readable summary data is available from the Department of Labor beginning with FY1997. Employers seek labor certifications from the Department of Labor for many more workers than the number of visas issued. Some large employer agents apparently routinely request authorization for more than 50% more workers than they actually have visas issued for.

The Department of Labor data reflects requests for labor certification for 203,450 persons during FY2004. Since the Department of Labor refused to accept requests for labor certification during the first five and one-half months of calendar year 2005, this figure more nearly reflects the potential demand for H-2B workers. Equally importantly the DOL data is the only available source of information for the different occupational categories for which H-2B workers are requested.

The attached Congressional Research Service study of Guest Worker programs state that:

According to DOL data on H-2B labor certifications, the top five H-2B occupations in FY2004, in terms of the number of workers certified, were: (1) landscape laborer, (2) forestry worker, (3) maids and housekeeping cleaners, (4) construction worker, and (5) stable attendant.

See, Attachment 1, at page CRS-5.

Our office has conducted extensive analysis of the DOL ETA data on applications for labor certification for H-2B workers. Annexed hereto as Attachment 2 is a chart reflecting statistical data by FY1997-2005 on the number of applications for H-2B workers. Annexed hereto as Attachments 3, 4, 5 and 6 are analyses of the most recent FY2005 DOL ETA data. Attachment 3 lists the distribution by state of the 33 states with applications for more than 1,000 H-2B workers in FY2005.

DOL ETA data utilizes the Dictionary of Occupational Titles (DOT) classification to indicate the jobs for which H-2B workers were sought by employers. See: <http://www.oalj.dol.gov/PUBLIC/DOT/REFERENCES/DOTCATE.HTM> for an explanation of the number system for those jobs. Attachment 4 reflects the distribution for all states of applications for H-2B workers by Major Occupational Categories. That data demonstrates the following distribution of applications for H-2B workers during FY05

Occ. Group	Industry Major Group: Dictionary of Occupational Titles	Group %	Num Aliens
4	Agricultural, Fishery, Forestry, And Related Occupations	47.57%	71,911
3	Service Occupations	17.64%	26,676

Equally importantly the H-2B program has increasingly been utilized by employers and their agents in an ever increasing number of occupations. Although the logging industry is the only industry for which the Department of Labor ever developed specific regulatory procedures for the H-2B program,<sup>9</sup> those operations utilize a relative small percentage of the total number of H-2B workers.

In recent years the H-2B program has become a principal economic determinant of wage rates and terms and conditions of employment in the landscaping industry especially in certain regions of the country.<sup>10</sup> Wage rates set by application of DOL methodology for the determination of required prevailing wages under the H-2B program in recent years have resulted in lower required prevailing wage rates than had been the case under previous methodology.<sup>11</sup>

8	Structural Work Occupations	12.43%	18,795
9	Miscellaneous Occupations	15.29%	23,115
5	Processing Occupations	3.07%	4,641
1	Professional, Technical, And Managerial Occupations	1.37%	2,073
2	Clerical And Sales Occupations	1.09%	1,646
7	Benchwork Occupations	0.74%	1,112
6	Machine Trades Occupations	0.65%	979

Attachment 5 utilizes the 2 digit level DOT classifications to indicate in more detail nationwide the diversity of jobs for which H-2B workers are being utilized by employers. Attachment 6 utilizes the 3digit level DOT classifications for the occupations for which more than 1,000 H-2B workers were sought during FY05.

<sup>9</sup> See, 20 CFR Part 655, Subpart C beginning at 20 CFR §655.201 which covers the “Labor Certification Process for Logging Employment and Non-H-2A Agricultural Employment.”

<sup>10</sup> Landscaping industry related jobs constituted approximately 37% of the H-2B labor certification applications to the U.S. Department of Labor during FY05. See, Attachment 6.

<sup>11</sup> See, U.S. DOL Employment and Training Administration materials discussing methodology since May 2005 for the determination of prevailing wage rates for the H-2B program. See: <http://www.workforcesecurity.doleta.gov/foreign/wages.asp> and “The Prevailing Wage Determination Policy Guidance for Nonagricultural Immigration Programs” (May 9, 2005) available at:

[http://www.workforcesecurity.doleta.gov/foreign/pdf/Policy\\_Nonag\\_Progs.pdf](http://www.workforcesecurity.doleta.gov/foreign/pdf/Policy_Nonag_Progs.pdf).

Most significantly that guidance states that:

The PERM regulation published on December 27, 2004, with an effective date of March 28, 2005, has modified the prevailing wage determination process in three significant ways:

1. The use of Davis-Bacon or the McNamara-O’Hara Service Contract Act is no longer controlling for prevailing wage determinations...

See PERM regulation, [http://workforcesecurity.doleta.gov/foreign/pdf/PERM\\_Final\\_Rule\\_12-27-04\\_FR.pdf](http://workforcesecurity.doleta.gov/foreign/pdf/PERM_Final_Rule_12-27-04_FR.pdf). 69 Fed Register 77326 (December 27, 2004). In many areas the Service Contract Act or the Davis Bacon Act had required significantly higher wages for H-2B workers. As to procedures prior to these changes, see: [http://friendsfw.org/H-2B/H-2b\\_Wage\\_Links.htm](http://friendsfw.org/H-2B/H-2b_Wage_Links.htm).

The 66,000 person cap on H-2B visas caused serious hardship to many truly seasonal industries during 2004 and especially in early 2005 and there is a strong and valid argument for avoiding the disruptions to expectations of both employers and workers of returning to a cap of 66,000 persons. Giving priority in employment to returning workers (by exempting them from the cap) is also reasonable. *However*, the H-2B program needs major regulatory oversight by the U.S. Department of Labor which is *totally* absent in practice. In addition, there is no valid reason for the exclusion of H-2B workers from representation by federally funded Legal Services Corporation programs as if they were unauthorized undocumented workers.<sup>12</sup>

### **History of Regulation of the H-2B Program**

The H-2 temporary labor program was initially created by the Immigration and Nationality Act (INA) of 1952. Prior to the Immigration Reform and Control Act of 1986

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A second aspect of the change in regulatory procedure is also particularly significant for determining the prevailing wage rate for low skill jobs. The May 9, 2005 program guidance states:

2. Where the Secretary of Labor uses, or makes available to employers, a governmental survey to determine the prevailing wage, such survey shall provide at least 4 levels of wages commensurate with experience, education, and the level of supervision. Where an existing governmental survey has only 2 levels, 2 intermediate levels may be created by dividing by 3 the difference between the 2 levels offered, adding the quotient thus obtained to the first level and subtracting that quotient from the second level.

The U.S. Department of Labor ETA attributes this change to [H-1B Visa Reform Act](#) (2005 Consolidated Appropriations Act, Section 421-430, Pub.L. 108-447). Prior to this change the prevailing wage process had utilized two tiers of wages. See: <http://www.dol.gov/esa/regs/compliance/whd/whdfs59.htm>.

The functional effect of these changes in methodology have been to lower the required prevailing wage rate for many H-2B jobs.

DOL ETA and Congress should revisit the process for determining prevailing wages for H-2B workers and should develop procedures to ensure that wage rates do not adversely affect the wages of domestic workers. See requirements of 20 CFR §655.0.

<sup>12</sup> See, enumerated list of aliens entitled to representation at 45 CFR Part 1626. See: April 13, 2005, Petition On Labor Law Matters Arising In The United States Submitted To The National Administrative Office Of Mexico Under The North American Agreement On Labor Cooperation Regarding The Failure Of The United States To Effectively Enforce Laws Protecting The Rights Of Immigrant Workers, available at: <http://www.dol.gov/ILAB/media/reports/nao/submissions/2005-01petition.htm>. See also: <http://www.nwjp.org/docs/NAALC-press-release.pdf>, <http://www.nwjp.org/docs/Fact-Sheet.pdf>, and Laura K. Abel, and Risa E. Kaufman, "Preserving Aliens' And Migrant Workers' Access To Civil Legal Services: Constitutional And Policy Considerations," 5 *U. Pa. J. Const. L.* 491 (2003) available at <http://www.law.upenn.edu/journals/conlaw/issues/vol5/num3/abel.pdf>.

(IRCA) there was no separate H-2B program.<sup>13</sup> There had been considerable advocacy to protect rights of temporary agricultural workers and Congress created the H-2A program for such workers and a separate H-2B program for non-agricultural workers.

Currently the full extent of DOL ETA regulations for H-2B workers outside of the logging industry can be found at 20 CFR 655.1 – 655.3. Regulations for Labor Certification Process for Logging Employment and Non-H-2A Agricultural Employment can be found at: 20 CFR Part 655, Subpart C (20 CFR 655.200 – 655.212). Comparison of the regulations for H-2B workers outside of logging and non-H-2A agricultural employment with the regulatory structure for H-2A agricultural workers readily demonstrates the degree to which the H-2B program lacks fundamental legal protections that are at least theoretically available to H-2A workers. Examination of the history of DOL regulation under the H-2 program demonstrates that this has been the case throughout the history of the program.

Prior to changes in the methodology for determination of prevailing wage rates under the H-2B system over the past several years, employers seeking to certification of need for H-2B workers were generally required to offer higher wage rates to H-2B workers than were offered to H-2A workers.<sup>14</sup> Although H-2A workers were required to be provided with housing at no cost by their employers, H-2B workers frequently incur significant housing costs.<sup>15</sup> Over the past several years the required prevailing wage rate has changed significantly for workers in the landscaping industry in Pennsylvania and at this point wage rates offered to H-2B workers may be lower than the AEW for H-2A workers in the area.<sup>16</sup> Moreover, despite requirements under

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<sup>13</sup> See, Congressional Research Service Report, Attachment 1 at page CRS-1.

<sup>14</sup> The adverse effect wage rate (AEWR) for H-2A agricultural workers is established pursuant to 20 CFR §655.107. Current AEWR rates are available at: <http://www.workforcesecurity.doleta.gov/foreign/adverse.asp>.

<sup>15</sup> Although in reality many H-2B employers or the agents are involved in arranging housing for H-2B workers (or in some cases directly house such workers) there is no effective regulation of such housing where arranged by employers or their agents or of the costs imposed for such housing.

<sup>16</sup> Even before the Spring 2005 change in the procedures for determination of prevailing wage rates for H-2B workers, the landscaping industry won a series of Employment Service Program Letters beginning in 2000 which essentially directed prevailing wage rates to ignore Service Contract Act wage rate requirements for landscaping workers who could be classified as Laborer, Landscape - DOT Code 408.687-014. See Program Letters at: [http://friendsfw.org/H-2B/H-2b\\_Wage\\_Links.htm](http://friendsfw.org/H-2B/H-2b_Wage_Links.htm). This resulted in significantly lower prevailing wage rate determinations than would have been the case under Service Contract Act rate requirements.

Since H-2B workers should generally not be classified as agricultural workers under the Fair Labor Standards Act (FLSA) they should theoretically be entitled to earn overtime pay at time and a half. In practice a significant number of employers of H-2B workers do not pay overtime wages. Our office has frequently encountered practices of employers paying straight time cash wages for hours worked over 40 hours in a week. Some H-2B employers even claim exemption from FLSA overtime requirements under the Motor Carrier Act and DOL methodology for determination of prevailing wage rates permits wage rates below minimum wage to be paid.



the Fair Labor Standards Act and overseas laws governing recruitment of temporary workers in Mexico and Guatemala, most H-2B employers fail to reimburse their workers for costs incurred by temporary workers “for the convenience of the employer” prior to their first week of employment.<sup>17</sup>

### **DOL Needs to Adopt Regulations to Enforce the H-2B Program**

The most fundamental problem for H-2B workers whose rights to payment of prevailing wages and required terms and conditions of employment as based upon the labor certification representations to DOL ETA have been violated is that DOL has *no mechanism* for investigating and responding to such violations.<sup>18</sup>

After enactment of IRCA in 1986 DOL ETA promulgated regulations thereunder at 29 CFR Part 501 for the enforcement of contractual rights of H-2A workers by the Wage and Hour Division, Employment Standards Administration of DOL. These regulations can and should be applied virtually verbatim to H-2B workers and the Wage and Hour Division of the Employment Standards Administration should be given the responsibility and *resources* to enforce these requirements.<sup>19</sup> A particularly important element of those protections is the provision in 29 CFR

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Employers of traveling carnivals employing H-2B workers assert exemption from even minimum wages and the prevailing wage rates approved by DOL ETA are below even minimum wage for such workers. See, FLSA at 29 U.S.C. §213(a)(3). That section provides an exemption from the minimum wage and overtime provisions of the FLSA for "any employee employed by an establishment which is an amusement or recreational establishment, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33-1/3 per centum of its average receipts for the other six months of such year." See, <http://www.dol.gov/esa/regs/compliance/whd/whdfs18.htm>

FY05 DOL ETA data indicates that H-2B applications were filed by employers under DOT occupational code 969.687-010 “circus laborers” for 1,530 H-2B workers. Prevailing wage rates for these workers were set on a weekly rather than hourly basis at rates as low as \$250 per week even though some of these workers might work as many as 90 hours in a week.

<sup>17</sup> See, *Arriaga v. Florida Pacific Farms, LLC*, 305 F.3d 1228 (11th Cir., 2002). See also: Mexican Federal Labor Law, Title II, Ch. I, Art. 28.

<sup>18</sup> As long ago as January 2000 our office met with representatives of the Employment and Training Administration and the Employment Standards Administration of DOL to discuss procedures for violations of the terms of labor certification for H-2B employers. In the end we were informed that the only circumstances under which DOL could respond to such violations was if there were independent violations of the FLSA (Fair Labor Standards Act) which could be addressed by the Wage and Hour Division. The ETA Regional Administrator had no procedure for investigating alleged violations.

<sup>19</sup> Congress can and should direct DOL to develop such regulations for enforcement of rights of both H-2B workers and of domestic workers employed or seeking employment with employers utilizing H-2B workers. In the interim Congress should direct DOL to apply the existing regulations at 29 CFR Part 501 to H-2B workers pending final agency action.

§501.3 barring discrimination or retaliation against workers making complaints or exercising rights under those protections.

### **DOL Needs to Establish Better Procedure for Recruitment of Domestic Workers**

Another fundamental defect of the H-2B system is the virtual total absence of any genuine requirement for recruitment of domestic workers. Our office has been advised that not only are H-2B job orders entered into the Employment Service System months before the employment period would begin, but that such job orders remain in the system for only ten (10) days. Those job orders are never put into interstate circulation to recruit workers within the US who would travel for employment. Employers seeking to utilize H-2B workers place a single ad in a local newspaper of general circulation months before the employment period and have no obligation to employ domestic workers who apply for employment after that initial recruitment period.<sup>20</sup>

### **Abuses by Employer Agents Need to Be Remedied**

The H-2B and H-2A programs have created intricate layers of domestic and overseas agents for employers of temporary workers. Many of these agents actively recruit employers to enter into the H-2 systems and some promise employers that they will be able to force their employees to repay all of the fees for their services.<sup>21</sup>

Some employers and their agents actively misrepresent the employment being offered to employees in order to avoid requirements to pay higher prevailing wage rates commensurate with the actual job duties. Some H-2B employers have discovered that they can re-sell their workers by becoming temporary employment agencies supplying H-2B workers theoretically employed for their own business operations to other businesses at rates considerably above those paid to the workers.

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The provision of resources to DOL ESA Wage and Hour Division for enforcement of any labor protection standards in temporary worker programs is critical to the operation of such programs. A complaint under the FLSA for a carnival worker for violations of the FLSA submitted in October 2005 has not yet had an investigation completed by DOL Wage and Hour.

<sup>20</sup> Under the H-2A system employers are supposed to engage in positive recruitment efforts for employment of domestic workers and job orders are supposed to be circulated as interstate clearance orders. Most importantly under the 50% rule domestic workers are entitled to employment at any time up to 50% of the employment period.

<sup>21</sup> Some agents for employers proudly advertise this on their websites. No mechanism exists within the Department of Labor or to our knowledge Department of Homeland Security USCIS or the Department of State for addressing such issues.

## **Conclusion**

Congress, the Department of Labor, Department of Homeland Security USCIS and the Department of State need to carefully review existing temporary worker programs and ensure that those programs protect the rights of both domestic workers and of foreign workers participating in the program.

There are strong arguments against “guestworker” programs that do not give foreign workers opportunities to earn the right to remain long term in the country,<sup>22</sup> but there is no excuse for establishing temporary worker programs that fail to operate effectively.

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<sup>22</sup> The H-2B program appears to bar workers from remaining employed for more than three years consecutively as H-2B workers. Such a provision certainly would appear unnecessary and counter-productive.

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<u>Attachment</u>	<u>Pages</u>
1. Extract from: Andorra Bruno, Specialist in Social Legislation Domestic Social Policy Division, Congressional Research Service, The Library of Congress, <b><u>Immigration: Policy Considerations Related to Guest Worker Programs</u></b> (January 2006), Order Code RL32044, available at: <a href="http://fpc.state.gov/documents/organization/62664.pdf">http://fpc.state.gov/documents/organization/62664.pdf</a>	10
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**Attachment 1 to**

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available at: <http://fpc.state.gov/documents/organization/62664.pdf>

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# CRS Report for Congress

Received through the CRS Web

## **Immigration: Policy Considerations Related to Guest Worker Programs**

**Updated January 26, 2006**

Andorra Bruno  
Specialist in Social Legislation  
Domestic Social Policy Division

Extracted: Full report available at

# Immigration: Policy Considerations Related to Guest Worker Programs

## Summary

At present, the United States has two main programs for temporarily importing low-skilled workers, sometimes referred to as guest workers. Agricultural guest workers enter through the H-2A visa program, and other guest workers enter through the H-2B visa program. Employers interested in importing workers under either program must first apply to the U.S. Department of Labor for a certification that U.S. workers capable of performing the work are not available and that the employment of alien workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. Other requirements of the programs differ.

The 109<sup>th</sup> Congress has enacted language as part the FY2005 Emergency Supplemental Appropriations Act (P.L. 109-13) to revise the H-2B program. Other bills before the 109<sup>th</sup> Congress propose to make changes to the H-2A program (S. 359/H.R. 884, H.R. 3857), the H-2B program (S. 278, H.R. 1587, S. 1438, S. 1918), and the “H” visa category generally (H.R. 3333), and to establish new temporary worker visas (S. 1033/H.R. 2330, S. 1438, S. 1918, H.R. 4065). S. 359/H.R. 884, S. 1033/H.R. 2330, and S. 1918 also would establish mechanisms for certain foreign workers to become U.S. legal permanent residents (LPRs). Other legislation regarding guest workers is expected to be introduced later in this Congress. Various guest worker measures were introduced in the 108<sup>th</sup> Congress, but they saw no action beyond committee referrals. President George W. Bush proposed a new, expanded guest worker program in January 2004 when he announced his principles for immigration reform. The President featured his proposal in his 2004 and 2005 State of the Union addresses.

The current discussion of guest worker programs takes place against a backdrop of historically high levels of unauthorized migration to the United States. Supporters of a large-scale temporary worker program argue that such a program would help reduce unauthorized immigration by providing a legal alternative for prospective foreign workers. Critics reject this reasoning and instead maintain that a new guest worker program would likely exacerbate the problem of illegal migration.

The consideration of any proposed guest worker program raises various issues, including the following: how new program requirements would compare with those of the H-2A and H-2B programs; program eligibility; inclusion of a program mechanism for participants to obtain LPR status; how family members of eligible individuals would be treated; what labor market test, if any, the program would employ; whether the program would be numerically limited; how the rules and requirements of the program would be enforced; and what security-related provisions, if any, would be included.

## Extracted

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# Immigration: Policy Considerations Related to Guest Worker Programs

## Introduction

In 2001, the United States and Mexico began Cabinet-level talks on migration. Although the details of these discussions were not made public, two issues — legalization and a temporary worker program — dominated media coverage. The talks lost momentum after the terrorist attacks of September 11, 2001, as the Bush Administration focused its attention on security-related matters. A temporary worker program (not limited to Mexico), however, remains of interest to some Members of Congress and Administration officials. Various bills to reform existing programs for foreign temporary workers and to create new temporary worker programs have been introduced in recent Congresses. Several such bills are before the 109<sup>th</sup> Congress. In January 2004, the Bush Administration outlined a proposal for a new temporary worker program. The new programs under discussion presumably would cover largely low-skilled workers.

## Background

The term *guest worker* has typically been applied to foreign temporary low-skilled laborers, often in agriculture or other seasonal employment. In the past, guest worker programs have been established in the United States to address worker shortages during times of war. During World War I, for example, tens of thousands of Mexican workers performed mainly agricultural labor as part of a temporary worker program. The Bracero program, which began during World War II and lasted until 1964, brought several million Mexican agricultural workers into the United States. At its peak in the late 1950s, the Bracero program employed more than 400,000 Mexican workers annually.<sup>1</sup>

The Immigration and Nationality Act (INA) of 1952, as originally enacted,<sup>2</sup> authorized a temporary foreign worker program known as the H-2 program. It covered both agricultural and nonagricultural workers who were coming temporarily to the United States to perform temporary services (other than services of an exceptional nature requiring distinguished merit and ability) or labor. Aliens who are

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<sup>1</sup> For additional information on these historical programs, see U.S. Congress, Senate Committee on the Judiciary, *Temporary Worker Programs: Background and Issues*, committee print, 96<sup>th</sup> Cong., 2<sup>nd</sup> sess., Feb. 1980.

<sup>2</sup> Act of June 27, 1952, ch. 477, codified at 8 U.S.C. §1101 *et seq.* The INA is the basis of current immigration law.

admitted to the United States for a temporary period of time and a specific purpose are known as nonimmigrants. The 1986 Immigration Reform and Control Act (IRCA)<sup>3</sup> amended the INA to subdivide the H-2 program into the current H-2A and H-2B programs and to detail the admissions process for H-2A workers. The H-2A and H-2B visas are subcategories of the larger “H” nonimmigrant visa category for temporary workers.<sup>4</sup>

## Current Programs

The United States currently has two main programs for importing temporary low-skilled workers. Agricultural workers enter through the H-2A program and other temporary workers enter through the H-2B program.<sup>5</sup> The programs take their names from the sections of the INA that established them — Section 101(a)(15)(H)(ii)(a) and Section 101(a)(15)(H)(ii)(b), respectively. Both programs are administered by the Employment and Training Administration (ETA) of the U.S. Department of Labor (DOL) and U.S. Citizenship and Immigration Services (USCIS) of the U.S. Department of Homeland Security (DHS).<sup>6</sup>

### H-2A Program

The H-2A program allows for the temporary admission of foreign workers to the United States to perform agricultural work of a seasonal or temporary nature, provided that U.S. workers are not available. An approved H-2A visa petition is generally valid for an initial period of up to one year.<sup>7</sup> An alien’s total period of stay as an H-2A worker may not exceed three consecutive years.

Employers who want to import H-2A workers must first apply to DOL for a certification that (1) there are not sufficient U.S. workers who are qualified and available to perform the work; and (2) the employment of foreign workers will not adversely affect the wages and working conditions of U.S. workers who are similarly employed. As part of this labor certification process, employers must attempt to recruit U.S. workers and must cooperate with DOL-funded state employment service

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<sup>3</sup> P.L. 99-603, November 6, 1986.

<sup>4</sup> For an overview of the INA’s nonimmigrant visa categories, see CRS Report RL31381, *U.S. Immigration Policy on Temporary Admissions*, by Ruth Ellen Wasem.

<sup>5</sup> The H-2B program is not limited to workers of a particular skill level and has been used to import a variety of workers, including entertainers and athletes.

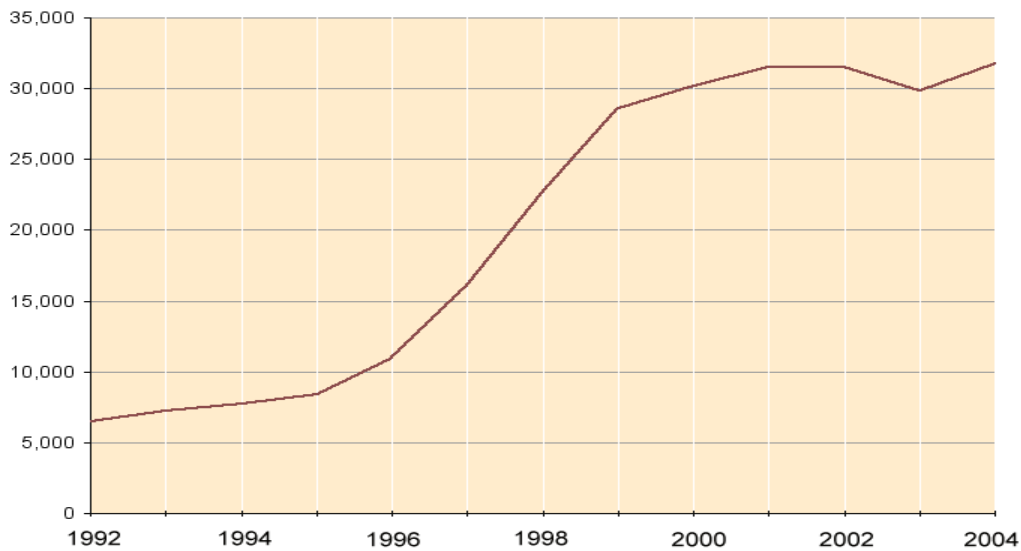
<sup>6</sup> Prior to Mar. 1, 2003, the H-2A and H-2B programs were administered by ETA and the Immigration and Naturalization Service (INS) of the Department of Justice. The Homeland Security Act of 2002 (P.L. 107-296, November 25, 2002) abolished INS and transferred most of its functions to DHS as of Mar. 1.

<sup>7</sup> See 8 C.F.R. §214.2(h)(5)(iv)(A). According to *Immigration & Nationality Law Handbook, 2001-02 Edition*, however, “both DOL and INS take a very restrictive approach regarding the length of time for which a [H-2A or H-2B] petition can be approved.” See Donna L. Lipinski, “The H-2s — A Class of Their Own,” *Immigration & Nationality Law Handbook, 2001-02 Edition*, vol. 2, pp. 86-87.

agencies (also known as state workforce agencies) in local, intrastate, and interstate recruitment efforts. Employers must pay their H-2A workers and similarly employed U.S. workers the highest of the federal or applicable state minimum wage, the prevailing wage rate,<sup>8</sup> or the adverse effect wage rate (AEWR).<sup>9</sup> They also must provide workers with housing, transportation, and other benefits, including workers' compensation insurance.<sup>10</sup> No health insurance coverage is required.<sup>11</sup>

Both growers and labor advocates criticize the H-2A program in its current form. Growers complain that the H-2A program is overly cumbersome and does not meet their labor needs. Labor advocates argue that the program provides too few protections for U.S. workers.

**Figure 1. H-2A Visas Issued, FY1992-FY2004**



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

<sup>8</sup> The prevailing wage rate is the average wage paid to similarly employed workers in the occupation in the area of intended employment. Additional information about prevailing wages is available at [<http://www.ows.doleta.gov/foreign/wages.asp>].

<sup>9</sup> The AEWR is an hourly wage rate set by DOL for each state or region, based upon data gathered by the Department of Agriculture in quarterly wage surveys. For 2004, the AEWR ranges from \$7.38 for Arkansas, Louisiana, and Mississippi to \$9.60 for Hawaii. See CRS Report RL32861, *Farm Labor: The Adverse Effect Wage Rate (AEWR)*, by William G. Whittaker.

<sup>10</sup> Required wages and benefits under the H-2A program are set forth in 20 C.F.R. §655.102.

<sup>11</sup> H-2A workers, like nonimmigrants generally, are not eligible for federally funded public assistance, with the exception of Medicaid emergency services. For further information on alien eligibility for federal benefits, see CRS Report RL31114, *Noncitizen Eligibility for Major Federal Public Assistance Programs: Policies and Legislation*, by Ruth Ellen Wasem; and CRS Report RL31630, *Federal Funding for Unauthorized Aliens' Emergency Medical Expenses*, by Alison M. Siskin.

**H-2A Visas Issued.** The H-2A program, which is not subject to numerical limits, has grown almost fivefold over the last decade. As illustrated in **Figure 1**, the number of H-2A visas, which are issued abroad by the Department of State (DOS), increased from 6,445 in FY1992 to 30,201 in FY2000, and has remained at about 30,000 annually since then. In FY2004, DOS issued 31,774 H-2A visas. According to preliminary data, 31,892 H-2A visas were issued in FY2005. The H-2A program, however, remains quite small relative to total U.S. agricultural employment, which stood at 3.2 million in 2002, according to DOL's Bureau of Labor Statistics.

## H-2B Program

The H-2B program provides for the temporary admission of foreign workers to the United States to perform temporary non-agricultural work, if unemployed U.S. workers cannot be found. Foreign medical graduates coming to perform medical services are explicitly excluded from the program. An approved H-2B visa petition is valid for an initial period of up to one year.<sup>12</sup> An alien's total period of stay as an H-2B worker may not exceed three consecutive years.<sup>13</sup>

Like prospective H-2A employers, prospective H-2B employers must first apply to DOL for a certification that U.S. workers capable of performing the work are not available and that the employment of alien workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. H-2B employers must pay their workers at least the prevailing wage rate. Unlike H-2A employers, they are not subject to the AEWB and do not have to provide housing, transportation,<sup>14</sup> and other benefits required under the H-2A program.

USCIS recently proposed regulations aimed at streamlining the H-2B petitioning process, which would significantly alter procedures.<sup>15</sup> Among other changes, the proposed rule, published in the *Federal Register* on January 27, 2005, would eliminate the requirement that prospective H-2B employers file for a labor certification from DOL in most cases. Instead, employers seeking H-2B workers in areas other than logging, the entertainment industry, and professional athletics would include certain labor attestations as part of the H-2B petition they file with USCIS.

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<sup>12</sup> See 8 C.F.R. §214.2(h)(9)(iii)(B).

<sup>13</sup> 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.

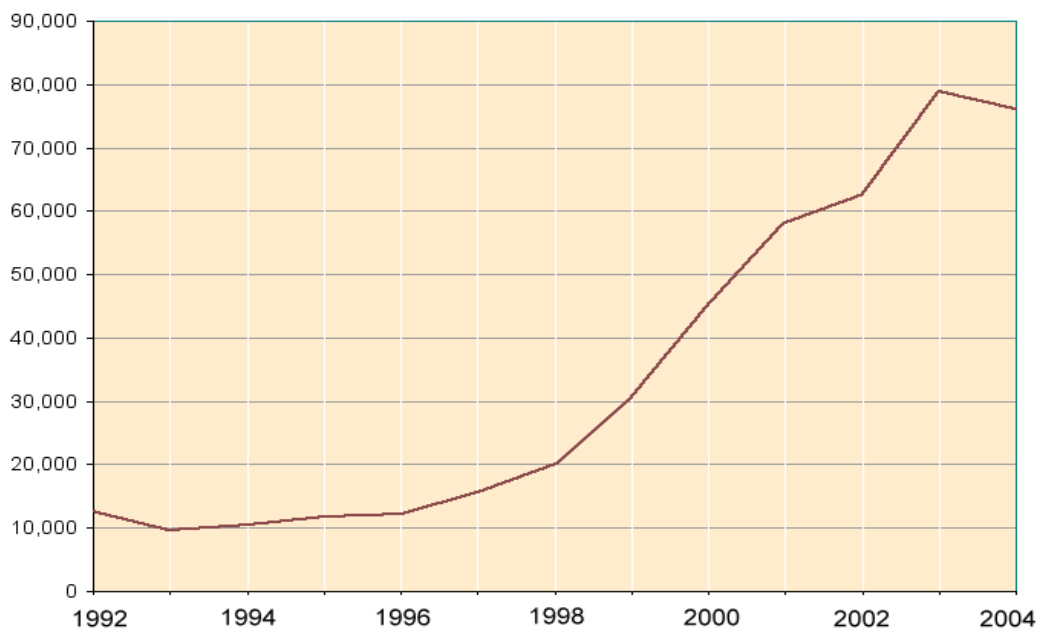
<sup>14</sup> While not subject to the broader transportation requirements of the H-2A program, H-2B employers are required by law to pay the reasonable costs of return transportation abroad for an H-2B worker who is dismissed prior to the end of his or her authorized period of stay.

<sup>15</sup> The proposed USCIS rule is available at [<http://a257.g.akamaitech.net/7/257/2422/01jan20051800/edocket.access.gpo.gov/2005/05-1240.htm>]. DOL has published a companion proposal, which is available at [<http://a257.g.akamaitech.net/7/257/2422/01jan20051800/edocket.access.gpo.gov/2005/05-1222.htm>].

According to the proposed rule, this H-2B attestation process would be similar to the process currently used for H-1B professional specialty workers.<sup>16</sup>

A key limitation of the H-2B visa concerns the requirement that the work be temporary. Under the applicable immigration regulations, work is considered to be temporary if the employer's need for the duties to be performed by the worker is a one-time occurrence, seasonal need, peakload need, or intermittent need.<sup>17</sup> According to DOL data on H-2B labor certifications, the top five H-2B occupations in FY2004, in terms of the number of workers certified, were: (1) landscape laborer, (2) forestry worker, (3) maids and housekeeping cleaners, (4) construction worker, and (5) stable attendant.

**Figure 2. H-2B Visas Issued, FY1992-FY2004**



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

**H-2B Visas Issued and the Statutory Cap.** Unlike the H-2A visa, the H-2B visa is subject to a statutory numerical limit. Under the INA, the total number of aliens who may be issued H-2B visas or otherwise provided H-2B status during a fiscal year may not exceed 66,000.<sup>18</sup> This cap does not apply to all H-2B petitions. Petitions for current H-2B workers to extend their stay, change their terms of employment, or change or add employers do not count towards the cap. As shown in **Figure 2**, the number of H-2B visas issued by DOS dipped from 12,552 in FY1992 to 9,691 in FY1993 and then began to increase steadily.

<sup>16</sup> For information on the H-1B nonimmigrant classification, see CRS Report RL30498, *Immigration: Legislative Issues on Nonimmigrant Professional Specialty (H-1B) Workers*, by Ruth Ellen Wasem.

<sup>17</sup> For definitions of these types of need, see 8 C.F.R. §214.2(h)(6)(ii).

<sup>18</sup> See INA §214(g)(1)(B).

In FY2003, DOS issued 78,955 H-2B visas, and in FY2004, it issued 76,169 H-2B visas. While for various reasons not all visas issued during a fiscal year necessarily count against that year's cap or, in some cases, any year's cap, USCIS acknowledged that the H-2B cap was exceeded in FY2003. With respect to the FY2004 cap, USCIS announced on March 10, 2004, that it had received a sufficient number of H-2B petitions to meet that cap. On January 4, 2005, it announced that the FY2005 cap had been reached. It indicated that it would process all petitions received by January 3, 2005, but would not accept any new H-2B petitions subject to the FY2005 cap after that date.<sup>19</sup>

Following the enactment of new H-2B provisions as part of the FY2005 Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief (P.L. 109-13) (see discussion below of S. 352/H.R. 793 in the 109<sup>th</sup> Congress), USCIS announced that on May 25, 2005, it would start accepting additional petitions for H-2B workers for FY2005.<sup>20</sup> Under P.L. 109-13, for FY2005 and FY2006, returning H-2B workers counted against the annual 66,000 cap during any one of the three prior fiscal years cannot be counted again. USCIS determined that approximately 35,000 previously approved H-2B workers for FY2005 qualified as returning workers who, under P.L. 109-13, were exempt from that year's cap, opening up 35,000 slots for other H-2B workers. Employers were able to file FY2005 petitions for new H-2B workers to fill those slots, as well as for cap-exempt returning H-2B workers. According to preliminary data, 87,492 H-2B visas were issued in FY2005.

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<sup>19</sup> U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, "USCIS Reaches H-2B Cap," press release, Jan. 4, 2005.

<sup>20</sup> U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, "USCIS to Accept Additional H-2B Filings for FY2005 and FY2006," public notice, May 23, 2005.

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**Attachment 2 to**

**Statement of  
Arthur N. Read, General Counsel  
Friends of Farmworkers, Inc.**

**Supplementation of Testimony for  
July 19, 2006 Hearing on**

**"Guest Worker Programs:  
Impact on the American Workforce and U.S. Immigration Policy"**

Attachment

2. H-2B Visas: Historical Numerical Overview

Pages

1



## H-2B Visas

FY	H-2B Applications DOL *	Dept. of State Visas**	
1992		12,552	
1993		9,691	
1994		11,000	***est. graphic
1995		12,000	***est. graphic
1996		12,500	***est. graphic
1997	35,773	17,000	***est. graphic
1998	41,270	20,000	***est. graphic
1999	63,079	31,000	***est. graphic
2000	103,971	45,000	***est. graphic
2001	109,004	58,000	***est. graphic
2002	140,755	63,000	***est. graphic
2003	165,110	78,955	
2004	203,450	76,169	
2005	151,182	87,492	

\* Source US DOL ETA Database

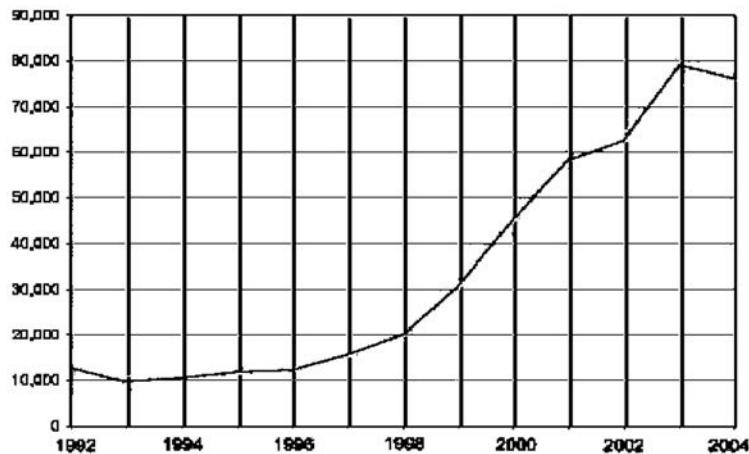
\*\* Source Congressional Research Service

\*\*\* Source Congressional Research Service Graphic

Andorra Bruno, Specialist in Social Legislation Domestic Social Policy Division, Congressional Research Service, The Library of Congress, Immigration: Policy Considerations Related to Guest Worker Programs (January 2006) Order Code RL32044, available at:

<http://fpc.state.gov/documents/organization/62664.pdf>

**Figure 2. H-2B Visas issued, FY1992-FY2004**



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

**Attachment 3 to**

**Statement of  
Arthur N. Read, General Counsel  
Friends of Farmworkers, Inc.**

**Supplementation of Testimony for  
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Attachment

3. States H-2B FY 2005: Ranked Listing of H-2B Applications to DOL ETA by State

Pages

1

## States H-2B FY 2005

Area	Number H-2B Applications DOL ETA*
US Total	151,182
TX	20,823
CO	11,319
VA	8,514
FL	8,190
PA	7,488
NY	7,461
MO	6,801
NJ	6,539
MD	5,751
MS	5,662
MI	5,522
MA	4,790
LA	4,653
CA	3,575
AR	3,230
OH	3,099
UT	3,016
AZ	2,903
NC	2,383
IL	2,209
ID	2,142
SC	2,029
GA	1,911
ME	1,892
WY	1,792
MN	1,620
CT	1,430
DE	1,402
KY	1,358
WA	1,260
WI	1,037
SD	1,036
IN	1,007
All Others	7,337

\* Source US DOL ETA Database

<http://www.flcdatacenter.com/CaseH2B.aspx>

**Attachment 4 to**

**Statement of  
Arthur N. Read, General Counsel  
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**Supplementation of Testimony for  
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Attachment

4. FY05 H-2B DOL ETA: Summary by Major Occupational Groups for Principal States

Pages

2

## FY05 H-2B DOL ETA

St_Rank	Work State	Num Aliens	St.%	Occupation Major Group *									
				1	2	3	4	5	6	7	8	9	n/a
	<b>Industry Group Per Cent:</b>			1.4%	1.1%	17.6%	47.6%	3.1%	0.6%	0.7%	12.4%	15.3%	0.2%
	<b>Total US</b>	151,182		2,073	1,646	26,676	71,911	4,641	979	1,112	18,795	23,115	234
1	TX	20,823	13.77%	105	236	1,685	8,388	666	205	328	8,071	1,139	
2	CO	11,319	7.49%	345	294	1,269	6,136	172	68		722	2,313	
3	VA	8,514	5.63%	36	86	1,512	4,555	931	100	11	665	618	
4	FL	8,190	5.42%	28	233	4,945	2,091	131		3	518	192	49
5	PA	7,488	4.95%	62	25	430	5,852	35	124	26	656	278	
6	NY	7,461	4.94%	207	174	1,752	3,715	40	134	87	354	998	
7	MO	6,801	4.50%			1,234	3,577		41		349	1,599	1
8	NJ	6,539	4.33%	314	62	490	4,911		7	68	378	309	
9	MD	5,751	3.80%	73	9	782	3,595	153	26		981	106	26
10	MS	5,662	3.75%	7		735	3,947	504			329	140	
11	MI	5,522	3.65%	4	215	2,446	2,482		1	65	301	8	
12	MA	4,790	3.17%	1	40	58	5	9			1	4,676	
13	LA	4,653	3.08%	11		133	1,380	1,319	9	92	1,346	362	1
14	CA	3,575	2.36%									3,548	27
15	AR	3,230	2.14%			39	2,400		26	55	415	295	
16	OH	3,099	2.05%	2		74	2,482	26	15	3	249	168	80
17	UT	3,016	1.99%	189		1,732	273	11		17	91	703	
18	AZ	2,903	1.92%		80	352	764	1	40		274	1,392	
19	NC	2,383	1.58%	10	1	276	1,869	20			98	109	
20	IL	2,209	1.46%	56	22	44	1,592		2	16	430	47	
21	ID	2,142	1.42%			9	290				97	1,746	
22	SC	2,029	1.34%	1		1,199	767				62		
23	GA	1,911	1.26%			116	1,078	101	4	20	83	509	
24	ME	1,892	1.25%	30	27	944	797	15			41	38	
25	WY	1,792	1.19%	24	3	1,132	291				317	25	
26	MN	1,620	1.07%	1	4	81	1,018	27			57	432	
27	CT	1,430	0.95%	163	72	477	438	18	37		198	27	
28	DE	1,402	0.93%			29	1,131				242		
29	KY	1,358	0.90%			17	1,165	71		13	34	58	
30	WA	1,260	0.83%	236		102	756		104	2	50	10	
31	WI	1,037	0.69%	2	11	112	444	23	15	50	365	15	
32	SD	1,036	0.69%	1	5	879	71	4	5		56	15	
33	IN	1,007	0.67%		5	96	621	17			105	163	
34	KS	894	0.59%	101		20	640				52	81	
35	TN	841	0.56%		10	45	529				147	110	
36	AL	767	0.51%			223	263	240			41		
37	MT	708	0.47%			124	302				242	40	
38	OK	654	0.43%			7	430	9	2	115	5	86	
39	VT	595	0.39%	14		344	77		6		102	52	
40	NH	556	0.37%		22	232	193				77	32	

## FY05 H-2B DOL ETA

St_Rank	Work State	Num Aliens	St.%	Occupation Major Group *									
				1	2	3	4	5	6	7	8	9	n/a
41	NV	526	0.35%		10	323	45				141	5	2
42	NE	377	0.25%			34	313					30	
43	ND	332	0.22%			110	15					20	187
44	RI	316	0.21%				32			2			282
45	NM	202	0.13%	10		20	1						171
46	IA	168	0.11%	1			107					60	
47	OR	168	0.11%	38		1	44					70	15
48	AK	121	0.08%			12		98	6				5
49	WV	60	0.04%				10						50
50	HI	52	0.03%				29					9	14
51	DC	1	0.00%	1									

Major Group	Group %	Num Aliens	* Occupation Major Group: Dictionary of Occupational Titles
1	1.4%	2,073	Professional, Technical, And Managerial Occupations
2	1.1%	1,646	Clerical And Sales Occupations
3	17.6%	26,676	Service Occupations
4	47.6%	71,911	Agricultural, Fishery, Forestry, And Related Occupations
5	3.1%	4,641	Processing Occupations
6	0.6%	979	Machine Trades Occupations
7	0.7%	1,112	Benchwork Occupations
8	12.4%	18,795	Structural Work Occupations
9	15.3%	23,115	Miscellaneous Occupations
n/a	0.2%	234	Not Specified
Total	100.0%	151,182	

\* Source US DOL ETA Database FY05  
<http://www.flcdatacenter.com/CaseH2B.aspx>

**Attachment 5 to**

**Statement of  
Arthur N. Read, General Counsel  
Friends of Farmworkers, Inc.**

**Supplementation of Testimony for  
July 19, 2006 Hearing on**

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Attachment

5. FY05 H-2B DOL ETA Occupations (2 Digit Dictionary of Occupational Titles)

Pages

2

## FY05 H-2B DOL ETA Occupation

Major Group	Industry	Occupation Group Description	Num Aliens	Per Cent
		<b>Total All Occupations</b>	151,182	100.00%
1	00	Occupations In Architecture, Engineering, And Surveying	14	0.01%
1	01	Occupations In Architecture, Engineering, And Surveying	1	0.00%
1	02	Occupations In Mathematics And Physical Sciences	6	0.00%
1	03	Computer-Related Occupations	10	0.01%
1	05	Occupations In Social Sciences	2	0.00%
1	07	Occupations In Medicine And Health	4	0.00%
1	09	Occupations In Education	13	0.01%
1	11	Occupations In Law And Jurisprudence	1	0.00%
1	13	Occupations In Writing	1	0.00%
1	14	Occupations In Art	12	0.01%
1	15	Occupations In Entertainment And Recreation	1,822	1.21%
1	16	Occupations In Administrative Specializations	68	0.04%
1	18	Managers And Officials, N.E.C.	104	0.07%
1	19	Miscellaneous Professional, Technical, And Manager	15	0.01%
2	20	Stenography, Typing, Filing, And Related Occupations	46	0.03%
2	21	Computing And Account-Recording Occupations	560	0.37%
2	22	Production And Stock Clerks And Related Occupation	9	0.01%
2	23	Information And Message Distribution Occupations	449	0.30%
2	25	Sales Occupations, Services	1	0.00%
2	27	Sales Occupations, Commodities, N.E.C.	37	0.02%
2	29	Miscellaneous Sales Occupations	544	0.36%
3	30	Domestic Service Occupations	210	0.14%
3	31	Food And Beverage Preparation And Service Occupations	10,590	7.00%
3	32	Lodging And Related Service Occupations	12,037	7.96%
3	33	Barbering, Cosmetology, And Related Service Occupations	34	0.02%
3	34	Amusement And Recreation Service Occupations	1,894	1.25%
3	35	Miscellaneous Personal Service Occupations	421	0.28%
3	36	Apparel And Furnishings Service Occupations	481	0.32%
3	37	Protective Service Occupations	236	0.16%
3	38	Building And Related Service Occupations	773	0.51%
4	40	Plant Farming Occupations	55,606	36.78%
4	41	Animal Farming Occupations	4,970	3.29%
4	42	Miscellaneous Agricultural And Related Occupations	20	0.01%
4	44	Fishery And Related Occupations	1,604	1.06%
4	45	Forestry Occupations	9,711	6.42%
5	50	Occupations In Processing Of Metal	27	0.02%
5	51	Ore Refining And Foundry Occupations	40	0.03%
5	52	Occupations In Processing Of Food, Tobacco, And Related Products	3,970	2.63%
5	55	Occupations In Processing Of Chemicals, Plastics,	149	0.10%
5	56	Occupations In Processing Of Wood And Wood Product	154	0.10%
5	57	Occupations In Processing Of Stone, Clay, Glass, And Related Products	225	0.15%
5	58	Occupations In Processing Of Leather, Textiles, And Related Products	20	0.01%
5	59	Processing Occupations, N.E.C.	56	0.04%
6	60	Metal Machining Occupations	73	0.05%
6	61	Metalworking Occupations, N.E.C.	260	0.17%
6	62	Mechanics And Machinery Repairers	49	0.03%
6	63	Mechanics And Machinery Repairers	52	0.03%
6	65	Printing Occupations	45	0.03%



## FY05 H-2B DOL ETA Occupation

Major Group	Industry	Occupation Group Description	Num Aliens	Per Cent
6	66	Wood Machining Occupations	240	0.16%
6	67	Occupations In Machining Stone, Clay, Glass, And Related Materials	202	0.13%
6	68	Textile Occupations	2	0.00%
6	69	Machine Trades Occupations, N.E.C.	56	0.04%
7	70	Occupations In Fabrication, Assembly, And Repair O	172	0.11%
7	71	Occupations In Fabrication And Repair Of Scientific, Medical, Photographic, Optical, Horological, And Related Products	1	0.00%
7	72	Occupations In Assembly And Repair Of Electrical Equipment	2	0.00%
7	73	Occupations In Fabrication And Repair Of Products	196	0.13%
7	74	Painting, Decorating, And Related Occupations	131	0.09%
7	76	Occupations In Fabrication And Repair Of Wood Products	133	0.09%
7	77	Occupations In Fabrication And Repair Of Sand, Stone, Clay, And Glass Products	290	0.19%
7	78	Occupations In Fabrication And Repair Of Textile, Leather, And Related Products	186	0.12%
7	79	Benchwork Occupations, N.E.C.	1	0.00%
8	80	Occupations In Metal Fabricating, N.E.C.	257	0.17%
8	81	Welders, Cutters, And Related Occupations	437	0.29%
8	82	Electrical Assembling, Installing, And Repairing Occupations	1,782	1.18%
8	84	Painting, Plastering, Waterproofing, Cementing, And Related Occupations	445	0.29%
8	85	Excavating, Grading, Paving, And Related Occupations	29	0.02%
8	86	Construction Occupations, N.E.C.	15,074	9.97%
8	89	Structural Work Occupations, N.E.C.	771	0.51%
9	90	Motor Freight Occupations	2,469	1.63%
9	91	Transportation Occupations, N.E.C.	923	0.61%
9	92	Packaging And Materials Handling Occupations	3,345	2.21%
9	93	Occupations In Extraction Of Minerals	1,654	1.09%
9	95	Occupations In Production And Distribution Of Utilities	1,309	0.87%
9	96	Amusement, Recreation, Motion Picture, Radio And Television Occupations, N.E.C.	1,624	1.07%
9	97	Occupations In Graphic Art Work	20	0.01%
9	99	Other Miscellaneous	11,771	7.79%
n/a	n/a	Not Classified	234	0.15%

Major Group	* Occupation Major Group: Dictionary of Occupational Titles	Num Aliens	Group %
1	Professional, Technical, And Managerial Occupations	2,073	1.4%
2	Clerical And Sales Occupations	1,646	1.1%
3	Service Occupations	26,676	17.6%
4	Agricultural, Fishery, Forestry, And Related Occupations	71,911	47.6%
5	Processing Occupations	4,641	3.1%
6	Machine Trades Occupations	979	0.6%
7	Benchwork Occupations	1,112	0.7%
8	Structural Work Occupations	18,795	12.4%
9	Miscellaneous Occupations	23,115	15.3%
n/a	Not Specified	234	0.2%
Total	<b>Total</b>	151,182	100.0%

\* Source US DOL ETA Database FY05

<http://www.flcdatacenter.com/CaseH2B.aspx>

**Attachment 6 to**

**Statement of  
Arthur N. Read, General Counsel  
Friends of Farmworkers, Inc.**

**Supplementation of Testimony for  
July 19, 2006 Hearing on**

**"Guest Worker Programs:  
Impact on the American Workforce and U.S. Immigration Policy"**

Attachment  
6. FY05\_H-2B\_Principal Occupations

Pages  
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## FY05\_H-2B\_Principal Occupations

Occ. Group	Industry Description	Occ. Sub Group	Occ. Group Description	Num Aliens	% Total	Sub Group Num Aliens
			<b>Total All Occupations</b>	<b>151,182</b>		
			<b>Sub-Total Itemized Below</b>	<b>125,745</b>	83.17%	
15	<b>Occupations In Entertainment And Recreation</b>			1,822	1.21%	
		153	Occupations In Athletics And Sports			1,729
			Other Occupational Group 15			93
31	<b>Food And Beverage Preparation And Service Occupations</b>			10,590	7.00%	
		311	Waiters/Waitresses, And Related Food Service Occupations			5,158
		313	Chefs And Cooks, Hotels And Restaurants			1,168
		317	Miscellaneous Food And Beverage Preparation Occupations			1,183
		318	Kitchen Workers, N.E.C.			2,839
			Other Occupational Group 31			242
32	<b>Lodging And Related Service Occupations</b>			12,037	7.96%	
		323	Housecleaners, Hotels, Restaurants, And Related Establishments			9,601
		329	Lodging And Related Service Occupations, N.E.C.			1,967
			Other Occupational Group 32			469
40	<b>Plant Farming Occupations</b>			55,606	36.78%	
		406	Gardening And Groundskeeping Occupations			1,589
		408	<b>Plant Life And Related Service Occupations.</b> *Occupational Code 408.687-014 Laborer, Landscape = 51,626 persons			53,346
			Other Occupational Group 40			671
41	<b>Animal Farming Occupations</b>			4,970	3.29%	
		410	Domestic Animal Farming Occupations			4,821
			Other Occupational Group 41			149
44	<b>Fishery And Related Occupations</b>			1,604	1.06%	
		449	Fishery And Related Occupations, N.E.C.			1,108
			Other Occupational Group 44			496
45	<b>Forestry Occupations</b>			9,711	6.42%	
		452	Forest Conservation Occupations			8,945
			Other Occupational Group 45			766
52	<b>Occupations In Processing Of Food, Tobacco, And Related Products</b>			3,970	2.63%	
		521	Separating, Crushing, Milling, Chopping, Grinding, And Related Occupations			1,028
		525	Slaughtering, Breaking, Curing, And Related Occupations			1,661
		529	Occupations In Processing Of Food, Tobacco, And Related Products, N.E.C.			1,150
			Other Occupational Group 52			131
82	<b>Electrical Assembling, Installing, And Repairing Occupations</b>			1,782	1.18%	
		821	Occupations In Assembly, Installation, And Repair Of Transmission And Distribution Lines And Circuits			1,326
			Other Occupational Group 82			456
86	<b>Construction Occupations, N.E.C.</b>			15,074	9.97%	
		869	Miscellaneous Construction Occupations, N.E.C.			13,802
			Other Occupational Group 86			1,272
90	<b>Motor Freight Occupations</b>			2,469	1.63%	
		904	Trailer-Truck Drivers			1,844
			Other Occupational Group 90			625
92	<b>Packaging And Materials Handling Occupations</b>			3,345	2.21%	
		920	Packaging Occupations			1,598
		929	Packaging And Materials Handling Occupations, N.E.C.			1,202
			Other Occupational Group 92			545
93	<b>Occupations In Extraction Of Minerals</b>			1,654	1.09%	

## FY05\_H-2B\_Principal Occupations

Occ. Group	Industry Description	Occ. Sub Group	Occ. Group Description	Num Aliens	% Total	Sub Group Num Aliens
		939	Occupations In Extraction Of Minerals, N.E.C.			1,488
			Other Occupational Group 93			166
95	<b>Occupations In Production And Distribution Of Utilities</b>			1,309	0.87%	
		955	Occupations In Disposal Of Refuse And Sewage			1,300
			Other Occupational Group 95			9
96	<b>Amusement, Recreation, Motion Picture, Radio And Television Occupations, N.E.C.</b>			1,624	1.07%	
		969	Miscellaneous Amusement And Recreation Occupations, N.E.C.			1,605
			Other Occupational Group 96			19
<b>Positions Below Not Included in Sub-total Above</b>						
99	<b>Other Miscellaneous</b>			11,771	7.79%	
		999	Other Miscellaneous			11,771
	<b>Other Job Classifications</b>			11,844	7.83%	

\* Source US DOL ETA Database FY05  
<http://www.flcdatacenter.com/CaseH2B.aspx>

**Attachment 7 to**

**Statement of  
Arthur N. Read, General Counsel  
Friends of Farmworkers, Inc.**

**Supplementation of Testimony for  
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Attachment

7. Excerpts from July 19, 2006 testimony before this Committee of attorney Rebecca Smith of the National Employment Law Project

Pages

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## **Excerpts from testimony before this committee of attorney Rebecca Smith of the National Employment Law Project**

The full testimony before this committee of attorney Rebecca Smith of the National Employment Law Project is available at:

<http://edworkforce.house.gov/hearings/109th/fc/immigration071906/smith.htm>.

The testimony by Ms. Smith included the following portions which are relevant to this supplemental testimony:

### **Additional Challenges: Guestworker Programs Can Mean an Unfair Deal for U.S. workers and Foreign Workers Alike.**

\* \* \*

Numerous examples of abuses exist under the current programs <sup>Fn.17</sup> ....

The H2A program is not the only U.S. guestworker program subject to abuse. <sup>Fn.24</sup> For example, a number of lawsuits have alleged that recruiters require that employees pay large recruitment fees and/or pledge collateral with the employer's representatives in order to be hired under the H-2B non-agricultural temporary worker program. A recent compilation of the stories of individual guestworkers chronicles unredressed workplace complaints, unaddressed workplace injuries and retaliation in the forestry industry. <sup>Fn.25</sup> .... These visa programs are generally less protective of both US and foreign workers than the H2A program, in that they have less regulations about the amount of work offered or wage levels, or of transportation and "recruitment" fees. None requires that employers make as extensive a search for U.S. workers as is required under H-2A.

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<sup>Fn.17</sup> For example, a number of lawsuits have alleged that recruiters require that employees pay large recruitment fees and/or pledge collateral with the employer's representatives in order to be hired under the H-2B programs. *Perez-Perez, et al, v. Progressive Forestry Services, Inc., et al*, U.S. District Court for the District of Oregon, Civ. No 98-1474-KI (D. Or.) (1998); *Vicente Vera-Martinez v. Grano Reforestation, Inc.*, U.S. District Court for the Western District of Arkansas; Case No. 03-6002 (2003); *Escolastico De Leon Granados, et al. v. Eller and Sons Trees Inc., et al.*, Northern District of Georgia, Case No. 1:05-CV-1473 (2005); *Hugo Martin Recinos-Recinos, et al. v. Express Forestry, et al.* U.S. District Court for the Eastern District of Louisiana, Case No. 05-1355 (2005).

<sup>Fn.24</sup> The H-2B program is the non-agricultural temporary worker program, typically used in the reforestation, landscaping and hospitality industries, among others. Under federal rules, labor contractors and employers must guarantee them a minimum hourly wage, or "prevailing wage," and certify that they have been unable to find enough domestic workers to do the job. The program policies are in a U.S. Department of Labor policy memorandum, U.S. Department of Labor, Employment & Training Admin, Attachment to GAL No. 1-95, Procedures for Temporary Labor Certification in Non-Agricultural Occupations, (Nov. 10, 1994), at [http://wdr.doleta.gov/directives/attach/GAL1-95\\_attach.pdf](http://wdr.doleta.gov/directives/attach/GAL1-95_attach.pdf). A number of lawsuits have alleged that recruiters require that employees pay large recruitment fees and/or pledge collateral with the employer's representatives in order to be hired under the H-2B programs. *Perez-Perez, et al, v. Progressive Forestry*

*Services, Inc., et al*, U.S. District Court for the District of Oregon, Civ. No 98-1474-KI (D. Or.) (1998); *Vicente Vera-Martinez v. Grano Reforestation, Inc.*, U.S. District Court for the Western District of Arkansas; Case No. 03-6002 (2003); *Escolastico De Leon Granados, et al. v. Eller and Sons Trees Inc., et al.*, Northern District of Georgia, Case No. 1:05-CV-1473 (2005); *Hugo Martin Recinos-Recinos, et al. v. Express Forestry, et al.* U.S. District Court for the Eastern District of Louisiana, Case No. 05-1355 (2005).

<sup>Fn.25</sup> *Beneath the Pines: Stories of Migrant Tree Planters*, Southern Poverty Law Center, [http://www.splcenter.org/images/dynamic/main/ijp\\_beneaththepines\\_web.pdf](http://www.splcenter.org/images/dynamic/main/ijp_beneaththepines_web.pdf)

**Attachment 8 to**

**Statement of  
Arthur N. Read, General Counsel  
Friends of Farmworkers, Inc.**

**Supplementation of Testimony for  
July 19, 2006 Hearing on**

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Impact on the American Workforce and U.S. Immigration Policy"**

Attachment

8. Excerpts from March 1, 2006 Senate Testimony of D. Michael Dale, Northwest Justice Project before the Public Lands and Forests Subcommittee, of the Committee on Energy and Natural Resources, of the United States Senate, chaired by the Honorable Larry E. Craig

Pages

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## **Excerpts from Senate Testimony of D. Michael Dale, Northwest Justice Project**

The recent testimony before this Committee by Ms. Smith is not the only occasion this year when the Congress has received testimony on the need for changes in the H-2B program. On March 1, 2006 attorney D. Michael Dale, Executive Director of the Northwest Workers' Justice Project testified concerning the protection of reforestation H-2B workers on public lands before the Public Lands and Forests Subcommittee, of the Committee on Energy and Natural Resources, of the United States Senate, chaired by the Honorable Larry E. Craig.<sup>1</sup> During his testimony Mr. Dale stated that:

### **DOL should adopt regulations imposing H-2A-like standards in the H-2B program.**

DOL could take some additional steps to strengthen enforcement. When the H-2B program was created, DOL was supposed to develop regulations modeled after the H-2A regulations. This was never really done, and the result is a lack of standards for H-2B workers. DOL should be encouraged to fulfill this obligation now. For the most part, the H-2A regulations should be the model, with consideration for the special aspects of forestry....

### **DOL and the forestry agencies should hold repeat offenders responsible for their actions.**

Both DOL and the forestry agencies need to be willing to take strong action against repeat offenders of labor standards....

### **The DOL should ensure that the H-2B program is used as intended--only when there is a shortage of US workers.**

The H-2B program is abused in forestry in a number of ways that should be addressed by DOL. The program is supposed to be used to provide a way to obtain needed workers for existing jobs where an employer can't find US workers available at a time and place needed for a specific job. Many forestry contractors, though, apply for H-2B workers before they know what contracts they will have. The workers are recruited and brought here on speculation that contracts will be awarded. Then, it may turn out that expected work is not available. This leads to underemployment of the workers, and commonly, to use of the workers in other jobs which pay less than the forestry wage and which are not authorized work. Since forestry jobs are covered by the Migrant and Seasonal Agricultural Protection Act, forestry contractors are required to give recruited workers a disclosure statement describing the particular work and pay arrangements they are offering. H-2B procedures require contractors to attempt to recruit US workers for the work for which foreign workers are sought prior to admission of the visa workers. DOL could require that forestry contractors supply a copy of their recruitment disclosure statement detailing promised work with their H-2B application to help ensure that the contractor actually has a specific need for workers.

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<sup>1</sup> That testimony is available at:

[http://energy.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing\\_ID=1528&Witness\\_ID=4329](http://energy.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=1528&Witness_ID=4329).

## **Forestry Workers should be given access to legal services provided by the Legal Services Corporation**

Ultimately, agency enforcement of labor standards can only go so far. Workers need to have the ability to take steps to protect themselves, and often will need specialized legal assistance to do so. H-2B workers are working in the United States legally as “guest” workers at the invitation of the United States, under guarantees of labor protections designed to protect them, and importantly, to protect the wages and working conditions of US workers. Yet, they are excluded from eligibility for representation by legal services programs that receive any funding from the Legal Services Corporation. Often, they find that there is no other legal representation available to them. There is no rational basis for this exclusion, and its elimination would do more to improve the conditions of H-2B forestry workers than any other step that Congress could take.