

Dirty Work In-Sourcing American Jobs with H-2B Guestworkers

By David Seminara

Americans don't want to mow your lawn. They don't want to serve you your lobster roll sandwich during your summer holiday in Maine. They won't drive the trucks that bring food to the grocery store you shop in, or chop down the trees that produce the paper you use, or perform at the circus you attend every summer. You'll also need the helping hand of a "temporary, seasonal" guestworker to help you get on the chair lift in Vail, and to learn how to ski or snowboard. Nor will Americans guard your swim club's pool, shovel the snow in your driveway, operate the rides at the amusement park you take your kids to, tidy up the hotel room you sleep in, or process the seafood you eat. Americans can't even be counted on to coach sports, or work construction jobs. American workers have grown soft, young people don't want to work, and the unemployed don't want to do much of anything strenuous these days.

These are the kind of flawed assumptions that have led to the creation and rapid growth of the H-2B visa program, which has resulted in more half a million jobs being filled by foreign guestworkers over the last five years, rather than Americans and immigrants already in the United States.

Despite the significant impact that the H-2B visa program has on American workers, the program receives scant media coverage compared to other guestworker categories. Issues surrounding the issuance of H-1B visas, for example, tend to receive far more media scrutiny because the beneficiaries and the victims are highly educated and often fall within the same social circles as journalists, and the topic of higher-paying skilled jobs is perceived to be more relevant to the kind of readership and viewership that advertisers desire. As the global recession continues to take its toll on the American economy, this is an opportune time to re-examine the H-2B program and to evaluate whether these jobs could be filled with people already in the United States. The goal of this report is to shed light on the poor conditions that H-2B guestworkers often toil in; to expose the damage that this program does to the most vulnerable sector of American workers: the poorly educated, students, minorities, and legal immigrants; to examine the recruiters who find workers and the employers who hire them; and to scrutinize the government's role in sanctioning and managing the H-2B bureaucracy.

Key Points

- The popularity of the H-2B program for temporary, seasonal, non-agricultural guestworkers has soared from just 15,706 visas issued in 1997 to an all-time high of 129,547 in 2007.
- The Save Our Small and Seasonal Business Act (SOSSBA) passed by Congress in 2005 provided an exemption for returning H-2B workers so that they would not count toward the annual 66,000 cap on H-2B visas. The SOSSBA was a windfall for H-2B employers, but Congress failed to renew the legislation in 2008. The U.S. Chamber of Commerce lists expanding the H-2B program as one of its "Policy Priorities for 2009."
- Despite the global economic crisis, demand for H-2B guestworkers remains strong, even in areas with high unemployment rates. American companies filed petitions to request nearly 300,000 H-2B workers in FY 2008.¹
- Use of the H-2B program has morphed from its original intent to help employers that need seasonal and/or temporary workers. The majority of the program's current users are neither small nor seasonal employers, but



Center for Immigration Studies

rather mid- to large-sized companies and recruiters that petition for H-2Bs to work for 10 months out of the year, year after year.

- Many of the businesses filing H-2B petitions for foreign workers are “body shops” that have no actual “seasonal or temporary” need for labor. Body shops can petition for large numbers of workers and then essentially sell them off to companies that either could not get their own H-2B workers or did not know how to do so. Given the fact that H-2B has an annual numerical cap, critics of body shops argue that they “hoard” workers and then drive up the price for everyone else.
- Despite credible allegations and even convictions for fraud and abuse of both H-2B workers and the program in general, neither the Department of Labor (DOL) nor the Department of Homeland Security (DHS) has ever barred a U.S. company from filing H-2B petitions. Some repeat offenders continue to have their petitions approved to this day.
- U.S. H-2B employers and the U.S. recruiters they hire often partner with foreign recruiters, and then deny knowledge of the foreign recruiters’ tactics when fraud and abuse are alleged. U.S. courts have not shown a willingness to try cases of abuse when the violations occur outside the United States, even if the case involves a job being performed in the United States.
- While many H-2B jobs offer low wages of less than \$10 per hour, a substantial number of H-2B visas go to more skilled workers who earn up to \$40 per hour. Industries that are particularly heavy users of the H-2B program include landscaping, forestry, hotels and restaurants, amusement parks and leisure facilities, and seafood processors.
- Employers value H-2B workers because their legal status in the United States is tied to their employment and because they often have extended families in their home countries depending on their wages, making them loyal and motivated workers. Racial discrimination may also induce U.S. employers to petition for H-2B workers rather than employ black American workers.
- Hourly compensation for U.S. workers has stagnated since the H-2B program began to expand in 2002, and economists have found no evidence of a labor shortage in the occupational groups that constitute the bulk of H-2B employment.²
- H-2B employers are required to advertise job vacancies prior to opening them up to H-2B guestworkers, but the ads more frequently resemble legal notices than real enticements and are often specifically designed to attract as little attention as possible.

H-2B Basics

The H-2B nonimmigrant visa classification applies to foreign nationals seeking to perform non-agricultural labor or services of a “temporary nature” in the United States, but the term “temporary” has come to be essentially meaningless in the H-2B context.

Some key basics regarding H-2B visas:

- The H-2B visa was created in 1986, as part of the Immigration Reform and Control Act, which split the H guestworker program into an H-2A visa for agricultural guestworkers, and an H-2B visa for non-agricultural guestworkers.
- U.S. firms filing H-2B petitions must establish that their need for the services or labor is “temporary,” regardless of how long that is.
- The petitioner’s need is considered “temporary” if it is a “one-time occurrence, a seasonal, peak load, or intermittent need.”
- U.S. Citizenship and Immigration Services (USCIS) more specifically defines temporary as “generally limited to one year or less,” but allows H-2B workers’ visas to be extended for an uninterrupted stay — either for the same or a different employer — of up to three consecutive years. After three

Center for Immigration Studies

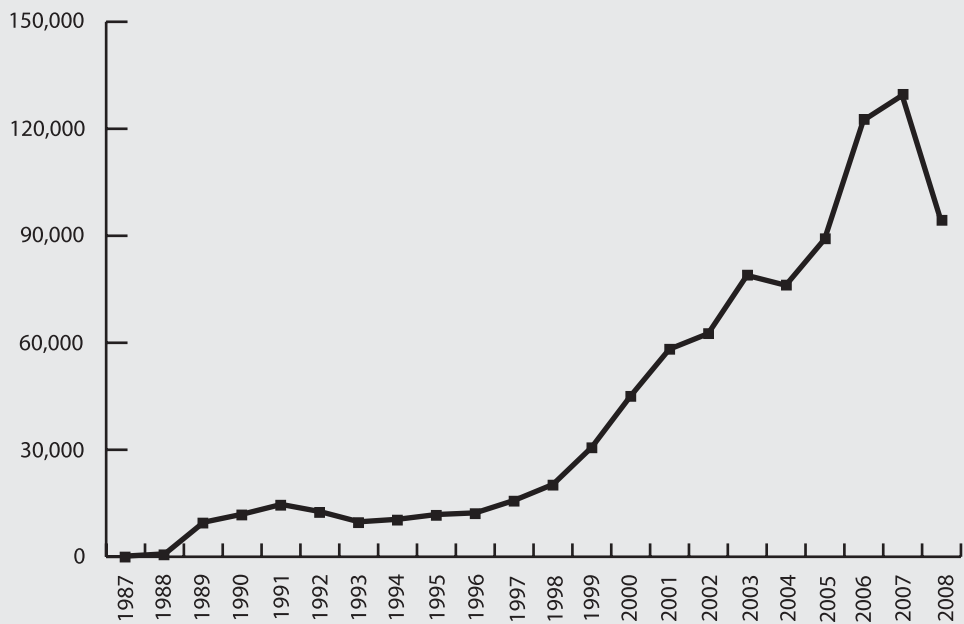
years in the United States, H-2B visa holders must reside outside of the United States for 90 days. If they spend less than 18 consecutive months in the United States, they only need to depart for 45 days to reset the clock to zero and return as an H-2B. If they were in the United States for more than 18 months, but less than three years, they need to reside outside the United States for 60 days before returning on an H-2B visa. These regulations were loosened under the George W. Bush Administration to allow H-2B employers to retain “seasonal” workers for longer periods of time.

- Congress has established an annual cap of 66,000 H-2B visas for each year, half of which become available on April 1, and the other half on October 1. SOSSBA allowed for “returning” H-2B workers to obtain H-2R visas that would not count against the cap. This act, which had nearly 150 co-sponsors in the House, pushed the total number of H-2B/H-2R’s to an all-time high of 129,547 in 2007

(see Figure 1). This legislation was allowed to expire on September 30, 2007, to the great consternation of business interests that continue to lobby for its renewal.

- Prospective employers of H-2B workers must first obtain certification from the U.S. Department of Labor (DOL) that 1) there are not sufficient U.S. workers who are able, willing, qualified, and available to do the temporary work; and 2) the employment of H-2B aliens will not adversely affect the wages and working conditions of similarly employed U.S. workers. (New DOL regulations may alter or end this requirement.)
- Once the employer has obtained an approved temporary labor certification, the employer may file a Form I-129, “Petition for a Nonimmigrant Worker,” with USCIS to classify the individual as an H-2B worker. Once the petition is approved, the worker may apply for an H-2B visa at a U.S. embas-

Figure 1. H2B Visas Issued, 1987-2008*



* Includes H-2R visas during 2005-7 period when “returning” H-2B workers did not count against annual cap. Figures also include H-2B renewals.

Sources: <http://www.travel.state.gov/pdf/NIVClassIssued-DetailedFY1987-1991.pdf>
<http://www.travel.state.gov/pdf/NIVClassIssued-DetailedFY1992-1996.pdf>
<http://www.travel.state.gov/pdf/NIVClassIssued-DetailedFY1997-2001.pdf>
<http://www.travel.state.gov/pdf/NIVClassIssued-DetailedFY2002-2006.pdf>
<http://www.travel.state.gov/pdf/NIVClassIssued-DetailedFY2003-2007.pdf>
<http://www.travel.state.gov/pdf/NIVClassIssued-DetailedFY2004-2008.pdf>

Table 1. H-2B Admissions, FY 2008

State	New	Returning	State Total
Texas	19,845	1,696	21,541
Louisiana	9,834	577	10,411
Florida	9,542	302	9,844
Colorado	6,211	165	6,376
Arizona	3,867	239	4,106
Virginia	3,826	127	3,953
Pennsylvania	3,613	109	3,722
Maryland	3,355	86	3,441
California	2,933	266	3,199
Alabama	3,081	115	3,196
Arkansas	3,007	76	3,083
Georgia	2,578	147	2,725
Mississippi	2,660	65	2,725
Utah	2,527	35	2,562
New Jersey	2,417	46	2,463
Missouri	2,326	53	2,379
New York	2,129	96	2,225
Ohio	1,895	18	1,913
North Carolina	1,658	39	1,697
South Carolina	1,487	65	1,552
Illinois	1,414	21	1,435
Unknown	1,301	63	1,364
Oklahoma	1,262	53	1,315
Michigan	964	34	998
Idaho	857	13	870
Guam	861	0	861
Delaware	779	18	797
Washington	780	15	795
Kentucky	682	52	734
Nevada	648	21	669
Massachusetts	523	56	579
Tennessee	501	56	557
Indiana	510	21	531
Kansas	466	26	492
Connecticut	467	24	491
Maine	391	87	478
Montana	467	5	472
Oregon	414	10	424
South Dakota	366	3	369
Wyoming	313	12	325
Wisconsin	249	11	260
Minnesota	191	21	212
Vermont	206	0	206
New Hampshire	185	19	204
Alaska	166	3	169
Nebraska	159	4	163
New Mexico	145	14	159
West Virginia	111	0	111
District of Columbia	104	0	104
Iowa	102	0	102
North Dakota	92	4	96
Rhode Island	81	6	87
Hawaii	62	0	62
Puerto Rico	5	0	5
Other	3	0	3

Source: Department of Homeland Security, Non-Immigrant Admissions (I-94 Only) by Class of Admission and Country FY 2008: <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2008/nimsuptable1d.xls>, <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2008/nimsuptable3d.xls>.

sy or consulate abroad. Unlike H-1B visa applicants, H-2B visa applicants — who are often unemployed in their home countries — must overcome section 214 (b) of the Immigration and Nationality Act, which requires that applicants prove they intend to return home after their visas expire.

- Employers are required to pay employees the prevailing wage (as set by the various state workforce agencies for each occupation and locality) and provide housing — though they are allowed to charge workers for it. H-2B workers are tied to the employer that files the petition for them; if a worker fails to turn up for work on five consecutive days, the employer is required to report the delinquency to the Department of Homeland Security.
- DHS, in concurrence with the State Department, determines which countries are eligible to participate in the H-2B program, based on how cooperative each country is on deportation and other consular issues, as well as “how important the country is to the operation of the H-2B program.”³ In 2009, citizens of the following countries are eligible to participate in the H-2B program: Argentina, Australia, Belize, Brazil, Bulgaria, Canada, Chile, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Indonesia, Israel, Jamaica, Japan, Mexico, Moldova, New Zealand, Peru, the Philippines, Poland, Romania, South Africa, South Korea, Turkey, Ukraine, and the United Kingdom.

Employers: We Want Our H-2Bs

A wide variety of U.S. employers rely on H-2B labor as an integral part of their labor force. Sectors of the American economy most dependent on H-2B workers include landscaping, forestry, hotels and tourism, seafood processing, restaurants, amusement parks, and construction. Popular websites like www.myvisajobs.com provide an inside glimpse at the types of companies that are importing H-2B workers and the specific jobs and wages they are securing. While many of the job openings listed on the site are what one might consider classic unskilled labor, some clearly are not. For example, the site lists approved H-2B petitions for professional coaches and athletes with employers like the U.S. Ski and Snowboard Association, which pay H-2B visa beneficiaries up to \$6,500 per month.

In trying to assess how reliant some U.S. firms are on H-2B visa labor, it's useful to examine the outcry when Congress failed in 2008 to renew SOSSBA. Al-

Center for Immigration Studies

Table 2. H-2B Admissions by Country of Citizenship, FY 2008

Country	New	Returning	Country Total	Country	New	Returning	Country Total
Mexico	70,812	4,126	74,938	South Korea	61	0	61
Jamaica	8,454	311	8,765	Venezuela	51	0	51
Philippines	3,684	0	3,684	Saint Lucia	41	0	41
Guatemala	3,216	59	3,275	Spain	40	0	40
Romania	1,756	186	1,942	Netherlands	39	0	39
South Africa	1,620	123	1,743	Italy	35	0	35
Israel	1,482	9	1,491	Austria	31	0	31
United Kingdom	1,449	0	1,449	Portugal	29	0	29
Australia	957	7	964	Lithuania	24	0	24
Unknown	776	10	786	Namibia	24	0	24
El Salvador	754	0	754	Switzerland	22	0	22
Brazil	738	12	750	Slovenia	20	0	20
Canada	645	67	712	Norway	19	0	19
Argentina	540	0	540	Russia	17	0	17
Costa Rica	434	10	444	Belgium	16	0	16
Honduras	439	3	442	Ecuador	15	0	15
India	421	0	421	Haiti	15	0	15
Indonesia	385	0	385	Hungary	15	0	15
New Zealand	367	6	373	Taiwan	14	0	14
Dominican Republic	320	30	350	Paraguay	13	0	13
Bolivia	336	0	336	Greece	12	0	12
Belize	328	0	328	Saudi Arabia	12	0	12
Nepal	311	0	311	Croatia	11	0	11
China	305	0	305	Denmark	11	0	11
Japan	289	3	292	Uruguay	11	0	11
Peru	286	0	286	Finland	10	0	10
Moldova	282	0	282	Macedonia	8	0	8
Ukraine	279	0	279	Lebanon	7	0	7
Chile	260	4	264	Malaysia	6	0	6
Bulgaria	257	6	263	Uzbekistan	6	0	6
Turkey	250	0	250	Zimbabwe	6	0	6
Trinidad & Tobago	220	0	220	Estonia	5	0	5
Poland	163	5	168	Ghana	5	0	5
Barbados	146	0	146	Tanzania	5	0	5
Nicaragua	144	0	144	Bahamas	4	0	4
Slovakia	115	7	122	Bosnia & Herzegovina	4	0	4
Colombia	119	0	119	Kenya	4	0	4
Germany	102	0	102	Pakistan	4	0	4
Ireland	75	0	75	Bangladesh	3	0	3
Vietnam	75	0	75	Burundi	3	0	3
France	72	0	72	Central African Republic	3	0	3
Czech Republic	66	0	66	Fiji	3	0	3
Sweden	64	0	64	Georgia	3	0	3
Panama	63	0	63	Mali	3	0	3

Source: Department of Homeland Security- Non-Immigrant Admissions (I-94 Only) by Class of Admission and Country FY 2008: <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2008/nimsuptable1d.xls>, <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2008/nimsuptable3d.xls>.

Note: Some of these source countries do not appear on the DHS list of eligible countries. We assume that is because beneficiaries may have be dual citizens or residents in an eligible country.

Center for Immigration Studies

though H-2B visas are rarely covered in the mainstream media, most of the articles on the topic in the last year have been sympathetic to businesses' desire for more H-2B labor, and feature quotes from aggrieved business owners and their advocates complaining about the failure to renew SOSSBA and the perceived shortage of seasonal workers. A typically sympathetic piece in the *Baltimore Sun* carried the sub-heading, "Congressional Dispute on Visas Puts Shore Businesses in a Bind."⁴ A similar story was published in the St. Louis *Post-Dispatch* under the headline, "Visa Program Not Delivering As

Many Imported Workers," making the "workers" sound like a commodity no different from soy beans or cocoa.⁵

Trade journals are even more brazen in their cheerleading for renewal of SOSSBA. One of the more blatant examples of this phenomenon is a March 13, 2008, article in the *Nation's Restaurant News* with the headline, "Debate Over H-2B Visa Cap Threatens Serious Shortage of Seasonal Workers," which appeared directly below another front-page headline warning, "Cost-Wary Restaurants Lay Off Large Numbers."⁶ Apparently the editor of this publication saw no contradiction in these two juxtaposed articles.

Table 3. Major H-2B Employers

Name	Number of H-2B Workers ¹	Typical Petition Length (Months)	Wage Range	State
Brickman Group (landscaping)	3,872	10.0	\$6.65 - \$9.68	Md.
Vail Resorts Inc. (skiing)	1,925	6.0	\$8.00 - \$12.54	Colo.
Marriott (hotels)	1,817	10.0	\$6.16 - \$12.00	Md.
Landscapes Unlimited (golf courses)	1,485	9.0	\$6.54 - \$10.29	Neb.
Hutco, Inc. (machining, welding)	1,378	10.0	\$6.50 - \$14.03	La.
Valley Crest (landscape management)	1,330	10.0	\$7.32 - \$10.64	Calif.
Ritz Carlton (hotels)	1,237	8.0	\$6.15 - \$14.25	Md.
Eller & Sons (forestry)	865	10.0	\$8.79	Ga.
American Pool Enterprises	759	8.0	\$7.50	Md.
Aspen Skiing Company	722	6.0 ²	\$7.07- \$34.45	Colo.
Hyatt (hotels)	615	10.0	\$6.15 - \$10.30	Ill.
WHM Luxury Hotels & Resorts	494	10.5	\$6.79 - \$12.50	Fla.

¹ Based on the number of approved labor certifications granted by the DOL for FY 2008. Note that the final number of H-2B workers ultimately granted visas may be less than the number approved.

² Aspen petitions for H-2B workers year-round in two sets of six-month increments.

Table 4. Major Recruitment Agencies That Petition Directly for H-2B Workers*

Name	Number of H-2B Workers	Typical Petition Length (Months)	Wage Range	State
Anchor Building Services	839	10.0	\$6.86 - 8.57	Mo.
Superior Forestry Service	830	9.5	\$6.04 - \$8.76	Ark.
A-Team Connection	822	10.0	\$6.75 - \$27.40	La.
LaborMex	743	10.0	\$7.00 - \$14.01	Fla.
Seasonal Solutions	584	10.0	\$6.97 - \$7.72	Mo.
Hotel & Resort Services Inc.	508	10.0	\$6.13 - \$8.57	Mo.

* Based on the number of approved labor certifications granted by the DOL for FY 2008. Note that the final number of H-2B workers ultimately granted visas may be less than the number approved.

Landscape Management covered the failure to renew the SOSSBA extensively, and in January 2008, ran a special section under the banner headline, “Crisis Planning,” with an article titled, “What Now? Smart Strategies to Survive and Perhaps Even Prosper in Spite of the Delay or Loss of H-2B Workers,” amidst the backdrop photo of a large group of worried-looking Mexicans in cowboy and baseball hats.⁷ The report contains a list of suggestions on “Living Without H-2B Workers,” which recommends that companies do a better job of training their employees to improve productivity and reduce turnover, cut out unprofitable jobs and problem customers, extend the hours of current employees who want overtime, mechanize to improve efficiency, consider raising prices, and “get the help wanted word out.”

In the segment about potentially raising prices, the author states that “few of the small owner/operators in your market use H-2B workers, so they’ll see your scaling back as an opportunity to pick up some of your business.” Indeed, I spoke to smaller landscaping companies who resent their larger competitors that use H-2B labor. Don Mullanack from All American Lawn Services in Vero Beach, Fla., who does not use H-2Bs, told me that he “hoped that they shut down the H-2B program and that all those companies that rely on it go out of business.” The section on “Living Without H-2Bs” concludes with a question and a warning: “How can you make your job descriptions attractive to them [unemployed Americans]? Chances are you’ll have to pay them more than you are used to paying.”

hiring illegal workers.” Rep. Bishop is certainly not the only champion of the H-2B Program. No member of Congress has been a more vocal champion for H-2B employers than Maryland Senator Barbara Mikulski.

Sen. Mikulski has long been a champion for the business interests of large H-2B employers; particularly Maryland-based seafood and landscaping concerns. She authored an op-ed for the influential Capitol Hill newspaper *The Hill* in February 2008 titled “Saving our Small, Seasonal Businesses Means Fighting to Preserve H-2B Visas.”⁸ The piece is typical of her efforts to paint H-2B employers as embattled small businesspeople who want desperately to hire Americans but simply cannot find any willing to work. Mikulski’s advocacy on behalf of H-2B employers in her state has earned her the unwavering support of major H-2B employers and advocacy groups (see Table 5).

We examine Sen. Mikulski’s recent campaign contributions here because she has been the public face and most vocal cheerleader for the H-2B program, but, in fairness, she is far from being the only politician feeding at the H-2B employer trough. There’s plenty of blame to go around, as evidenced by the current bipartisan push to renew SOSSBA, which currently has 37 co-sponsors in the Senate, 21 Democrats and 16 Republicans.⁹ The House has a similar bill introduced by Rep. Frank Kratovil Jr. (D-Md.), which currently has 24 co-sponsors, including 12 Democrats and 12 Republicans.¹⁰

Beholden to Special Interests

The April 16, 2008, congressional testimony provided by Rep. Tim Bishop (D-N.Y.) is typical of the kind of doom and gloom prophecies voiced by business owners who want more H-2B workers. “Without a returning worker exemption this year businesses in my district will be forced to close and my community will suffer Stimulating growth and returning our country to prosperity cannot occur without delivering such relief to America’s small businesses We cannot leave small businesses who want to do the right thing with the unacceptable choice of going out of business or

Table 5. Contributions to Sen. Barbara Mikulski, 2007-2008

Contributor	Amount
Brickman Group PAC (landscaping)	\$5,000
American Hotel & Lodging Association	\$5,000
C.E.O. of Choice Hotels International (private donation)	\$4,600
Marriott International	\$2,500
Federation of Employers & Workers (H-2B advocacy)	\$2,500
National Roofing & Contractors Association	\$2,000
International Association of Amusement Parks PAC	\$1,500
President of the Grand Hotel, Mackinac Island (private donation)	\$1,000
Tree Care Industry Association	\$1,000
Outdoor Amusement Business Association	\$1,000
National Turkey Federation PAC	\$1,000
National Chicken Council PAC	\$1,000
National Marine Manufacturer’s Association PAC	\$1,000

Source: Federal Election Commission, Campaign Finance Data, <http://www.fec.gov/finance/disclosure/srssea.shtml>.

Parting Gifts from George W. Bush

George W. Bush was a vocal advocate for guestworker programs. In 2004, Bush proposed a new guestworker program that, had it been enacted, would have tripled the number of visas issued to seasonal workers. On January 18, 2009, his administration published new regulations that significantly reduced oversight of the H-2B application process and extended the definition of “temporary” in the H-2B context from 10 months to up to three years. The move would also replace the need for employers to obtain H-2B labor certification, with an “attestation” that qualified U.S. workers could not be found. Associate General Counsel of the AFL-CIO, Lynne Rhinehart, gave congressional testimony regarding the changes and neatly summed up many of the problems, not only of Bush’s regulatory changes, but of the H-2B program in general:

“Under the new rules, employers experiencing a long-term need for a larger workforce could completely avoid the demands of the domestic labor market by serially employing H-2B workers to meet this long-term need. This would drag down wages and working conditions for workers in the industry or region as a whole. The combination of

self-attestation, the elimination of the state workforce agencies, and the broadened definition of “temporary” will further depress wages in the industries in which the H-2B program operates, to the detriment of U.S. workers. And, because there is an endless supply of citizens of foreign countries willing to work in the United States ... employers have little or no economic incentive to meet the economic demands of U.S. workers seeking a better wage.”¹

As we go to press, it is not yet clear whether President Obama will repeal Bush’s changes to the H-2B program, but the issue certainly presents him with an opportunity to side with the interests of American workers over the interests of big business.

Mom & Pops They Are Not

Advocates of raising the cap on H-2B visas frequently invoke the notion that the primary beneficiaries of the H-2B visa program are small, mom & pop-type businesses. In reality, it is usually cost prohibitive for small businesses to hire an immigration attorney to help them navigate the dizzying bureaucracy that goes with trying to obtain a DOL labor certification and ultimately im-

Brickman Landscaping

Brickman — one of the embattled “small businesses” that Sen. Mikulski and her allies are trying to save — calls itself “one of the nation’s largest landscape design companies” and has 160 branches in 29 states. Brickman is a year-round business that does both landscaping and “snow and ice management.” Brickman’s business model is heavily reliant on in-sourcing H-2B labor. In 2008, Brickman’s various branches received DOL certification to in-source 3,872 jobs with H-2B labor covering all four seasons from February 11 to December 1, with jobs paying between \$6.65 and \$9.68 per hour. For each of the nearly 4,000 jobs, Brickman pays exactly what the “prevailing wage” is, and not a penny more. Interestingly, the various Brickman locations nearly all used the same February 11 to December 1 dates, even though one might presume that the company would have different labor needs in Boca Raton, Fla., and Plano, Texas, compared to Benton Harbor, Mich., and Pittsburgh, Pa. Brickman’s use of the program is clearly far from a “seasonal, peak-load, or one-time occurrence.” Indeed, Brickman’s use of H-2B labor appears to be increasing, even as the economy falters. In 2007, they received certification for “only” 2,965 H-2B’s, so their 2008 use of the program represented a substantial 30 percent increase over the previous year.

Brickman has had its share of brushes with the law as well. In 1997, Immigration and Customs Enforcement (ICE) agents raided Brickman’s St. Louis operation and deported 50 illegal Mexican workers.¹ In 2008, a federal judge in the U.S. District Court in Philadelphia ruled that Brickman had to pay back wages to more than 100 H-2B employees for making visa, broker, and transportation deductions from their paychecks that brought their wages below the minimum wage.² According to consular officers in the field, Brickman is notorious for its misuse of the H-2B program. Brickman declined to speak with me for this report. In early May 2009, I contacted multiple Brickman recruiters posing as a job applicant, but was never contacted for an interview.

¹ Karen Branch Brioso, “Hispanic Immigrants Turn to St. Louis,” *St. Louis Post-Dispatch*, May 8, 2004, http://www.justicejournalism.org/projects/brioso_karen/brioso_043004_7.pdf.

² *Daily Commercial News and Construction Record*, January 25, 2008, <http://dconl.com/article/id26139>.

porting and housing H-2B workers.¹² The bulk of approved H-2B petitions go to medium- and large-size businesses that import hundreds, if not thousands, of workers each year, like Six Flags; major hotel chains, including Marriott, Ritz Carlton, and Westin; and large landscaping companies like the Brickman Group.

The president of the Brickman Group, Mark Hjelle, is also on the board of directors of Save Small Business (SSB),¹³ a lobbying group that calls itself “a grassroots educational coalition” whose mission is to increase the H-2B labor pool by renewing SOSSBA. SSB’s website contains an FAQ on H-2Bs intended to dispel “myths” about the program. One of the so-called myths is that “People on welfare should be taking all of these jobs.” The site claims that this is not feasible because welfare recipients lack the skills to perform H-2B jobs and do not live where the jobs are located (no mention of the fact that H-2B visa holders obviously don’t live near the jobs either). An example cited is lifeguard jobs, “a lifeguard job requires that the applicant can swim. Not all welfare recipients can swim.” This “grassroots” coalition to save “small business” appears to be run by medium- and large-sized companies that are major users of the H-2B program. Examining SSB’s board members reveals the kind of companies that have a vested interest in the expansion of the H-2B program.

The president of the luxury 385-room Grand Hotel in Mackinac Island, Mich., is also a member of the SSB board. The hotel boasts a 500,000-gallon pool and the world’s longest front porch. In 2008, The Grand received DOL labor certification to in-source 369 jobs with H-2B labor, including 25 wine stewards, 20 groundskeepers, 70 housekeepers, 20 chefs, 24 bellhops, 94 waiters, 114 kitchen helpers, and two stable attendants.¹⁴ Michigan currently has a 15 percent unemployment rate, but if the Grand is in dire need of workers, you wouldn’t know it from their homepage. The career opportunities link is buried in small print at the bottom of the page. I filled out an online application in April 2009, which essentially just asked for my name, phone number, e-mail, and address, but was never contacted about a job opening. I followed up with a generic e-mail asking about job opportunities (using another name) and was told by someone in HR that there were no jobs available. I was not asked for a resume or any questions about what type of job I was looking for. The Grand’s website has a generic job opportunities page making it appear as though they are hiring.¹⁵

The vice president of SSB, Jack Brooks, is the president of J.M. Clayton Seafood and told the *Wall Street Journal* in 2009 that he typically imports about a dozen seasonal guestworkers per year, and claimed that

he was trying to find Americans to fill job vacancies.¹⁶ In fact, the company requested and received DOL approval for 150 H-2B workers in FY 2007, and received approval for 149 H-2Bs in 2008, after requesting 150.¹⁷

I asked Mr. Brooks in April 2009 why they did not list any job opportunities on the company website and he said, “I never thought of it, but that’s a good idea, maybe I’ll do it.” Brooks went on to boast that his company had recently held a “job fair” to try to recruit American workers. I asked him where he held the event, naively expecting him to name a major town or city near the company’s base in Cambridge, Md. “Hooper’s Island,” he responded. The U.S. Census Bureau recorded only 441 inhabitants on Hooper’s Island, so it would seem to be a curious choice for a job fair. “You gotta recruit where the jobs are!” Brooks claimed. As of September 2009, there are still no jobs advertised on the company website. I e-mailed the company to inquire about job opportunities and never received a response.

Another SSB board member is Elizabeth Whitley, the chairman of Más (Mid-Atlantic Solutions) Labor, which describes itself as “the number-one for-profit service provider of H-2 services.” As part of their “basic package,” Más Labor offers “up to 10 Mexican workers” for \$4,100-\$5,300, delivery included. Más Labor represents a variety of big businesses — in 2008, Más Labor was listed as the agent on 482 different labor certification requests petitioning for a whopping 12,393 jobs (some are listed under Más Labor, some are listed as Elizabeth Whitley, some as Elizabeth D. Whitley, and others Elizabeth Whitley/Más Labor).

With the national unemployment rate now topping 10 percent, the U.S. Chamber of Commerce listed “expanding temporary immigration programs like the H-2B visa” as one of its “Policy Priorities for 2009.”¹⁸ Another organization that has been a vocal advocate of expanding the H-2B program is the Essential Worker Immigration Coalition (EWIC), whose website claims that it is a coalition of groups “concerned with the shortage of lesser skilled and unskilled (‘essential worker’) labor.” While there is no explanation on the website of why unskilled workers are more “essential” than others, or why they believe there is a “shortage” of such workers, there is a list of the coalition’s members.

A quick scan of the EWIC membership list¹⁹ reveals a wide variety of special interest groups that share one common bond: a vested interest in the widest possible pool of hourly wage labor. EWIC and SSB are by no means the only groups advocating for an increase in H-2B visas — a basic Google search reveals a whole host of other like-minded advocacy groups including the Federation of Employers and Workers of America, the H-2B

Workforce Coalition, and Immigration Works among many others. The Federation of Employers and Workers of America was listed as the petitioner's agent for 404 different H-2B labor certification requests in 2008, representing 12,559 jobs in-sourced to H-2B guestworkers.

Why Employers Prefer Guestworkers

The popularity of the H-2B program can be charted in the meteoric growth of the program (see table 1) from a mere 62 visas issued in the program's first year in 1987, to 15,706 issuances in 1997, to a whopping 129,547 in 2007.²⁰ It should be noted that the yearly figures do not accurately reflect the total number of H-2B workers in the United States at any given time because workers are eligible to extend their visas for stays of up to three years and the numbers only reflect actual visa issuances by the State Department, not renewals or adjustment of visa status cases approved by the DHS/United States Citizenship and Immigration Services (USCIS). But why aren't Americans hired for the jobs that H-2B workers fill? I've spoken to numerous employers that use H-2B labor in some of the sectors of our economy that rely most heavily on seasonal guestworkers, including landscaping companies, seafood processors, ski resorts, and hotels. Below are some of the most commonly cited reasons why U.S. employers use H-2B guestworkers.

Dirty Work. Many employers are convinced that Americans no longer have the stomach for doing dirty, repetitive, or physically taxing work in difficult conditions. Business owners often claim that they've tried increasing wages and benefits to attract American workers, but that Americans simply do not want to take difficult jobs. These notions are contradicted by evidence that when companies offer attractive wages and benefits, they generally have little trouble finding American workers to do jobs in difficult fields like garbage collection, custodial work, and dishwashing.

For example, the Associated Press reported in March 2009, that the Edison Junior High School in Massillon, Ohio, received 700 applications for a janitorial job that offered a \$15 per hour salary, plus benefits.²¹ DOL approved hundreds of H-2B labor certification requests for FY 2008 jobs in the Canton-Massillon area, which has an 12 percent unemployment rate. SSB board member Más Labor filed many of these petitions for landscaping companies all within an hour of the Canton-Massillon region.

A few of the examples were: Rice's Nursery in North Canton (27 workers for nine-month contract work at \$6.85 per hour), Turfscape Co. in Twinsburg

(65 workers for 10-month contract work, at \$7.20), and Todd's Envirosapes in Louisville, (44 workers, nine-month contracts, \$7.38). The Federation of Employers and Workers also helped in-source 37 jobs in nearby Akron for R.B. Stout, Inc. The point here is that this is a part of the country that has plenty of Americans looking for work and willing to do difficult jobs. The only catch is that they want to make enough money to actually be able to support their families.

Americans Won't Move for Seasonal Work. Seasonal destinations that have a high cost of living like Cape Cod or Vail do not have wide pools of labor looking for seasonal hourly wage work, and so employers in these areas obviously need to recruit from outside their immediate area. The problem is that the Department of Labor only requires that employers recruit from within "normal commuting distance" of the actual job the employer seeks to fill. This means that if I own a business on Mackinac Island, Mich., I only need to make efforts to advertise and recruit locally, and not in say Grand Rapids or Detroit, where there would obviously be a much larger pool of unemployed applicants looking for hourly wage jobs. It requires a leap of faith to understand that if a ski resort in Breckenridge, Colo., for example, cannot fill its seasonal jobs locally, then the next logical step would be to recruit workers from Europe, rather than Denver. H-2B employers invariably claim that they do try to recruit from areas outside their immediate zip code, but that Americans won't move for seasonal work. Americans actually change their place of residence more frequently than almost any country in the world, and workers go where the best paying jobs are. Seasonal businesses in Alaska, for example, have long been able to attract workers from the lower 48 states, simply by offering attractive wages and affordable housing.

Racial/Ethnic Stereotypes and Discrimination. Black workers frequently compete for the kinds of hourly wage jobs that H-2B workers occupy. While there is no way to quantify the precise role that racial discrimination has played in the displacement of black workers in common H-2B occupations, there is strong anecdotal evidence to suggest that some employers would prefer to hire foreign H-2B labor because they harbor prejudices about black workers. I've heard from numerous H-2B employers that they use Mexican laborers because they perceive them as more highly motivated, less likely to make demands for raises, take sick days, or ask for improvements in working conditions compared to the kinds of workers these employers would have to hire if there were no H-2B program.

Given that the minimum wage in Mexico is about \$4 per *day*, its easy to see how Mexican H-2B workers would value a \$7 per hour, no-benefits job more than an American worker who might view the same opportunity as a dead-end job to be endured rather than valued. Mexican H-2B workers often come to the United States bearing the burden of large, extended families counting on them to send money back to Mexico, and thus they have extra motivation to “stick out” a tough and thankless job. Additionally, most H-2B workers arrive in the United States without families, so they are free of the kind of baggage that American workers have with respect to family obligations and commitments. They are in the country solely to work, and are single minded about making and saving as much money as they can. As we will explore later in this report, many H-2Bs from around the world have the added burden of trying to earn enough to pay back the large sums of money they pay headhunters in their home countries to arrange H-2B jobs for them.

Websites like www.latinlabor.com, www.mexican-workers.com, www.mexicanlabor.com, and www.maslabor.com play upon the positive stereotypes of the reliable Mexican worker. These are not just staffing agencies providing help to employers that need workers, but rather legal American companies that are actually selling Mexican workers as a commodity to businesses that want to employ them. It wouldn't be legal for American companies to only consider job applicants from just one ethnic group, but staffing services can market workers from one country, Mexico in this case, with impunity. For example, www.mexican-workers.com has a section on its website entitled, “Mexican Workers — The Obvious Choice”²² which extols the virtues of Mexican H-2B workers as “happy agreeable people,” with a “strong work ethic” that are often “under-employed.”

Carol Swain, professor of law at Vanderbilt University and the editor of the book *Debating Immigration*, told me “African American workers can be perceived as being too demanding, employers like the idea of being able to import more docile workers and some black leaders have expressed a reluctance to criticize another downtrodden group.” Swain, an expert on immigration and its impact on black Americans, cited a Northwestern University study authored by Devah Pager²³ that reported that whites with *felony convictions* were significantly more likely to get job callbacks than similarly qualified blacks with no criminal records. Obviously Latinos face

workplace discrimination as well, but discrimination against black workers appears to be more pronounced.

Few, if any, of the major users of the H-2B program make any concerted effort to recruit in high unemployment, inner-city neighborhoods, or to advertise vacancies in publications and media outlets that reach the black demographic. I asked several different H-2B employers that complained to me of a shortage of workers about their efforts to recruit black workers and was frequently met with incomprehension. One crab processor in eastern Maryland scoffed at my suggestion that he consider recruiting in inner-city neighborhoods in nearby Baltimore. “Why would I recruit all the way over there?” he asked as though I were talking about another planet.

Students Aren't Available. American high school and college students have long been a sensible fit for seasonal employers that need summer help, but seasonal employers increasingly prefer the flexibility and commitment of H-2B workers over students who often have to abandon their jobs before Labor Day weekend to return to school. Many seasonal summer businesses are open during the shoulder seasons in April-May, and September-October, and students cannot always commit to working during these time periods.

Tricks of the Trade: Common H-2B Petition Fraud

Overlapping Petitions. Firms that want year-round workers file separate petitions covering both halves of the year, often under different company names or subsidiaries. For example, a hotel that wants year round maids might petition for one group from January-June, and another to replace them from July-December.

Job Description Fraud. Employers or recruiters petition for workers to do jobs that have low prevailing wages, then, when the workers arrive, they actually perform jobs that would have garnered them a higher prevailing wage. For example, a company might call “cooks” “kitchen helpers” because the prevailing wage for “kitchen helpers” is lower.

Free Time. Employers or recruiters petition to bring in H-2B's for an initial period of 10 months, even though they are not needed for full-time work for the whole 10 months. When not needed, the company or recruiter offers the employee “free time” where they can pick up day labor or other illegal work in the cash economy.

Stacking the Decks. Petitioning for far more workers than one needs in order to prevent competitors from getting them, or to farm them out to others at a higher cost.

Hiring Americans = Raising Prices. Business owners often claim that they'd like to raise workers' hourly wages and offer them benefit packages, but that if they did, they'd have to raise their prices as well. They argue that consumers ultimately benefit from the lower prices they are able to offer as a result of the labor savings they reap by in-sourcing H-2B labor. The connection between employee wages and consumer prices is beyond the scope of this report, but suffice it to say that the low wages = low prices theory has some holes in it. While the formula may seem logical, the reality is that: 1) businesses do not *automatically* pass on their labor savings to the customer — generally businesses are only going to charge as much as they can for their product or service, and will pass on labor savings to the customer only if they absolutely have to, and 2) employee wages are typically not the biggest factor in the pricing for most products or services.

Help (Not Wanted)

One of the many bureaucratic requirements of the H-2B program is that would-be H-2B employers need to demonstrate that they have made efforts to fill the jobs locally. The specific advertising requirement demands that prospective H-2B employers place two help wanted ads in the highest circulation daily newspaper in their area. The ads themselves are a prime example of what a charade the entire H-2B process is. First, the ads are nearly always run at the “wrong” time of year. Employers may not file for H-2B workers more than 120 days before the job actually starts, and because of the amount of bureaucracy involved and the numerical shortage of visas, companies need to start the H-2B process as early as they can. So jobs need to be advertised usually about four months before they are actually available. A ski resort that wants workers in November might be running ads in July and a crab processor that wants workers for the spring would be advertising in November. Obviously, very few people looking for seasonal, hourly wage jobs have the luxury of waiting four months or more to begin work.

Compliance ads themselves are easily distinguishable from normal recruitment ads — many of them are written by immigration attorneys or consultants to ensure legal compliance. Most look like legal notices, in that there is no boldface text, no italics, no thick borders around the ads to make them stand out, and they are filled with needlessly long job descriptions that make the jobs sound as unappealing as possible. The ads may as well say, “please do not apply for this job.”

Typically compliance ads require respondents to travel to a state workforce agency to “register there for a

referral” rather than directly to an employer. The ads do not list a website where applicants could find out more information about the application process and basic information like the hours that the career center is open. While it's easy to understand why DOL doesn't trust employers to screen applicants themselves, what kind of seasonal job applicant wants to have to travel to a job center, in the hopes of registering for a referral for a job that begins in several months?

Compliance ads all tend to be clustered together at the same time of year. For example, in late October, if you get out your magnifying glass and look hard enough in the help wanted section of your local newspaper, you will probably see a maze of compliance ads for landscaping jobs. A good example of this is the Sunday, October 26, 2008, help wanted section of the *St. Louis Post Dispatch*, which contains compliance ads from 27 different landscaping companies. Remarkably, all 27 ads are almost exactly the same, even though they are from distinct companies, indeed competitors, ostensibly trying to recruit from the same pool of labor. All of the ads advertise “temporary” work from February 15 to December 15 at \$8.65 per hour. Not a single one of the 27 ads makes any attempt to differentiate itself by offering different wages or benefits or working conditions. If you wanted workers to respond to your specific ad, knowing that many of your competitors will also be advertising, wouldn't you want to try to mention something about your company? There is no information in any of the ads that would entice workers — none of the companies say anything about themselves or why anyone should want to work for them.

Additionally, compliance ads often end up in publications whose readership is a poor match for the kinds of jobs on offer. For example, J.M. Clayton Seafood in Cambridge, on Maryland's Eastern Shore, is required to advertise the job vacancies they have each year in a newspaper called the *Easton Star Democrat*, the largest daily newspaper in the immediate area with a very modest circulation of 16,752. There is nothing wrong with advertising in small newspapers, but the era of searching for jobs in newspapers is all but over and the DOL does not require jobs to be advertised online. Trying to reach young workers, legal immigrants, minorities, and other potential seasonal workers through the help wanted section of a local newspaper simply makes no sense.

Recruitment advertising sales reps were very candid in describing the farce that is H-2B compliance advertising. I asked one recruitment advertising director at a major daily newspaper in the Northeast if H-2B employers cared whether they received a response

to their ads. “They don’t want a response at all — and many of them are quite blunt about telling us that,” she said, before going on to describe how some employers would demand that the job openings be removed from the newspaper’s website. “We run their ad in the paper, and then it goes on our website for free, but there is no requirement for them to advertise on the Internet, so they ask us to take it off our site.” Other sales reps described H-2B compliance advertisers wanting to run their ads during the week rather than on Sundays, when more people read the help wanted section.

I asked Jack Brooks, president of J.M Clayton Seafood, about his recruitment advertising expenditures. After a lengthy preamble about how difficult it is to find workers, he acknowledged that the last time his company placed a help-wanted ad was simply to meet the compliance requirement in November 2008 in the *Easton Star Democrat*, for jobs that were to begin Spring 2009. So despite Brooks’ moaning to members of the media about how hard it is to find workers, the bottom line is that he devoted no budget whatsoever to advertising vacancies for the six months prior to when the work was to begin.

Advertising H-2B job vacancies is essentially a formality. The reality of the complex H-2B process is that most employers need a lawyer or consultant to assist them, and once they’ve committed to trying to in-source H-2Bs, they’ve already gone past the point of trying to recruit local workers to fill the jobs. Employers obviously want to gain DOL labor certification that there aren’t local workers to fill the H-2B jobs, so they actually have a vested interest in ensuring that there is no response to the ads that they place. Once a business has decided to utilize H-2B labor to fill vacancies, and has taken steps to make that happen, any local job applicants that express an interest in the vacancies are essentially just getting in the way.

Suspicious Petitions: Carrollton, Ky. A former colleague who worked at a very busy H-2B processing consulate south of the border recently told me about his post’s efforts to investigate suspicious H-2B petitions they received from a number of companies located in Carrollton, Ky. (population 800), about an hour outside of Cincinnati, Ohio. Carrollton sits within Carroll County, which has a staggering 13 percent unemployment rate.

A company called Refractory Services had petitioned for 80 “janitors” to work from October 1, 2008, to July 31, 2009 at the Kentucky steel mill of North American Stainless (“NAS”). NAS is part of the Acerinox Group, the third-largest steel conglomerate in the world. According to the consulate, Refractory Services

claimed that the janitors were needed to clean the NAS factory “during the slow season when the factory was not producing steel.” The consulate delved into the case and discovered that the owner of Refractory Services had also petitioned under the name Harris Contractors for an additional 45 “laborers” to work from February 1 through November 30, 2008. (I subsequently discovered that the same person ran a third temporary labor service in Carrollton, a company called Carrollton Mill Services, which petitioned for 80 “production helpers” during the period January 1 through October 30, 2008.)

All of these petitions had been certified by the Department of Labor, which requires that the jobs have been advertised in local newspapers. Nevertheless, the officer’s suspicions were aroused by the filing of multiple petitions in an area of high unemployment and by the seeming discrepancy between the 10-month duration of the temporary employment period and the claim that these workers were mainly needed during the mill’s non-producing period. He contacted the Carroll County Chamber of Commerce to learn more about the purported seasonality of NAS’s business and the purported unavailability of U.S. workers in a region with high unemployment.

The official, written response from the local chamber was blunt and surprising, especially considering that chamber of commerce people are nearly always cheerleaders for business interests, even when they collide with the interests of American workers. “My understanding is that NAS is a year-round producing mill,” the Chamber wrote. “I contacted a local employment agency that indicated they have 154 people (presumably Americans) available to do light industrial contracting such as you have indicated. It appears to me that we have available American workers to fill any positions [the labor contractors] may have.”

My own research backed up the consulate’s own initial findings. According to NAS, there are no “non-producing” periods at the mill, although there can be times during the year when lesser production takes place. Although Refractory Services claimed that the janitors were needed during the slow period, NAS stated that the slow period was August and September, which is not the period covered by the petition. Concerning the local employment picture, a Chamber of Commerce employee told me over the phone: “We have way too many unemployed people here.” I asked her if those people would be willing to do tough jobs for \$7 per hour. “Absolutely,” she answered, “we’re not that lazy that we won’t do tough jobs here!”

I do not know the final outcome of the consular investigation, but the initial investigation found evi-

dence, supported by my own research, that Refractory Services misrepresented the duration and seasonality of NAS's needs for extra janitors, and that, notwithstanding the Department of Labor certification, there may be plenty of Americans in Carroll County looking for the jobs being filled by foreign H-2B workers.

Sadly, it is easier to find examples of abuse in the H-2B program than examples of government vigor in rooting out abuse. It's safe to say that this consulate's response to apparent abuses was the exception and not the rule. It is not the State Department's job to re-adjudicate H-2B petitions, and most consular posts and officers simply haven't the time or resources to investigate every doubt they may have about a Department of Labor certification. It should also be noted that neither DHS nor the DOL has any budget earmarked to combat abuse of the H-2B program. The Carrollton petitions just happened to arouse the suspicion of a particular consular officer, who made the time to investigate.

The "Great Recession" and the Impact of H-2Bs on American Workers

In 2008, some 2.6 million American jobs disappeared, in the most precipitous annual decline since World War II. Yet on July 29, 2008, USCIS announced that the H-2B cap for the first half of fiscal 2009 had been reached. According to the American Hotel and Lodging Association this is the earliest the H-2B cap has been reached since the inception of the program.²⁴ Reports also indicate that the cap for the second half of FY 2009 was reached very quickly, with all petitions dated after January 8, 2009, being denied. These indicators demonstrate that even with the American unemployment rate topping double digits, and with nearly 16 million Americans looking for work, the demand for H-2B workers shows no signs of slowing down. Indeed, during a recession companies are looking to cut costs and may view the H-2B program as a good way to weather tough economic times.

Perhaps even more startling than the consistent demand for H-2B workers despite the recession, is the fact that some employers in particularly high unemployment areas like Bakersfield, Calif., Bend, Ore., Ocean City, N.J., and Vero Beach, Fla., continue to use, and in some cases, have actually increased their H-2B workforce despite local area unemployment rates of over 10 percent. Below is a sampling of H-2B employment certification requests that were approved by the DOL in FY 2008 despite very high local unemployment rates.

- **John's Island Club, Vero Beach, Fla., 15 percent unemployment rate:** Received approval for 125 "dining room attendants" to be paid \$7 per hour for work August 1, 2008, to May 31, 2009. Records indicate that John's petitioned for "only" 100 dining room attendants in 2007.
- **Dandy Souvenirs, Fresno, Calif., 15 percent unemployment rate:** Petitioned and received DOL certification for 45 amusement park workers to work all four seasons, January 18 to November 12, 2008, at \$7.74 per hour.
- **Mamma Marinez Concessions, Bakersfield, Calif., 14 percent unemployment rate:** Petitioned for 30 amusement park workers and was approved for 29 in June 2008, making \$8.14 per hour for a contract from August 14, 2008, to April 21, 2009.
- **Nor-Cal Pump & Well Service, Yuba City, Calif., 17 percent unemployment rate:** Petitioned for six well drill operators and was approved for April 1 to October 31, 2008, at \$23.85 per hour.
- **7th Mountain Resort (owned by Premium Resorts International), Bend, Ore., 14 percent unemployment rate:** Petitioned for 15 housekeepers and 10 dining room attendants and was approved for April 1 to November 30, 2008, at \$8.25 and \$8.04 per hour.
- **Hammock Dunes Club, Palm Coast, Fla., 16 percent unemployment rate:** Petitioned for 19 landscapers/laborers and was approved for 17, for April 1 to December 31, 2008, at \$7.76 per hour.
- **Worldwide Entertainment, Las Vegas, Nev., 13 percent unemployment rate:** Petitioned for 100 dancers at \$14 per hour, but was denied. Apparently someone at the Department of Labor understood that there are at least 100 Americans willing to dance in Las Vegas for \$14 per hour.

An examination of the first quarter 2009 unemployment rates for subsets of the American population most often in competition for common H-2B jobs (teenagers, students, immigrants, minorities, and those with less than a high school diploma) reveals that these segments of our society are already in dire straits when it comes to finding work. Consider the following unemployment rates for groups that frequently compete for H-2B jobs: immigrants, 10 percent; workers with less

than a high school diploma, 17 percent; teens 16 to 17, 22 percent; black teens, 41 percent. Also consider the substantial percentage of persons aged 18-65 who are not currently in the workforce, either because they have given up looking for jobs, or by choice: just 33 percent of African-Americans with less than a high school diploma are in the labor force; just 18 percent of all teens 16 to 17 are in the labor force; and just 42 percent of natives with less than a high school diploma are in the labor force.²⁵ The current 24 percent unemployment rate for teenagers is the highest figure on record.

The impact of the H-2B program on unemployed Americans is obvious, but what effect has the program had on Americans employed in industries that make heavy use of H-2B labor? Despite gains in productivity, wages for Americans have fallen relative to inflation since 2002, during a time of rapid growth of the H-2B program. Researchers from the Economic Policy Institute examined seven of the most common H-2B occupations and found that real wages in common H-2B occupations have been flat over the last seven years, unemployment in the H-2B sectors has been high relative to other sectors of the American economy, and that there is no evidence that the United States has a labor shortage in the most common H-2B occupations.²⁶ I compared the median wages of several common H-2B occupations in 2003 versus 2008, using Department of Labor data, and found that in each case wage increases had failed to keep up with inflation. For example, the median hourly wage for housekeepers in 2003 was \$8.06, and had climbed to only \$9.13 by 2008. Dishwashers had progressed only from \$7.27 to \$8.19, hotel desk clerks from \$8.43 to \$9.37, and amusement park attendants from \$7.35 to \$8.40.

What cannot be measured statistically is how fast wages might have risen had there been fewer numbers of H-2B workers in the United States, and what negative effect H-2B workers have on the benefit packages of Americans working in fields with large numbers of H-2B workers. For example, the Institute for Women's Policy Research estimates that 85 percent of food service industry employees receive no paid sick leave whatsoever.²⁷ Of course, eliminating the H-2B program isn't suddenly going to magically produce paid sick leave and health benefits for American workers who don't have them, but the more employers have to compete to attract staff, the better benefits they will be forced to offer.

Resorting to a guestworker program to address alleged "shortages" of workers in specific occupations and regions eliminates the possibility that the market will correct the "shortage." For example, if there aren't enough workers willing to take \$8 per hour, no-benefit,

slaughterhouse jobs in North Dakota, then the slaughterhouses need to self-correct the problem by offering higher wages and some benefits in order to attract workers from stagnant or contracting industries. If, instead of increasing wages and benefits, the slaughterhouses resort to the wide-scale use of guestworkers and keep the wages and benefits the same, the problem/shortage will persist and the market cannot self correct. Ross Eisenbrey of the Economic Policy Institute elaborated on this issue in April 2008 while testifying before Congress on the issue of seasonal work visas: "To jam market signals by resorting to a visa program for special types of workers has the potential to prevent the optimal allocation of labor, leading to market distortions. One such distortion is the dampening of wage gains."²⁸

Aside from the negative effects the H-2B program may have on wages, unemployment, and benefit packages for American workers, we also need to consider the intangible consequences of the program on our social fabric. Anyone who's ever taken a sociology course can tell you that employment is a good thing for a person's well being. Work teaches us to be responsible and keeps us out of trouble. When teenagers cannot find that first job, they miss out on a crucial rite of passage to adulthood. When students cannot find summer jobs, they have a more difficult time paying for college. When workers of all kinds fail to find work, they burden already strapped social service agencies, and are more likely to become substance abusers or engage in criminal activity. None of these factors will show up on the Department of Labor's website, but there are clearly negative social consequences to in-sourcing jobs that would otherwise go to Americans.

Bargain Labor, High Prices

Perhaps you acknowledge that the in-sourcing of H-2B labor is detrimental to American workers, but you believe that we all benefit from the lower prices that the employers pass onto consumers. An examination of the Department of Labor FY 2008 Foreign Labor Certification Data Center.²⁹ reveals that many H-2B employers aren't low-cost competitors, but rather companies that charge very high prices for their products and services, calling into serious doubt the notion that employers pass on their H-2B labor savings to consumers. In fact, upscale hotels appeared to be heavier users of the H-2B program than budget hotels. For example, I could find no youth hostels, and only one Motel Six and one Super 8, both in Wyoming, that used H-2Bs in 2008. These hotels petitioned for only 16 workers, whereas there were dozens of Marriott and Ritz Carlton locations

that petitioned for well over 1,000 workers in FY 2008. Obviously budget hotels need fewer workers, but every hotel needs at least some staff. Below are examples of major H-2B hotel and resort employers and the prices they charge their guests.

The Four Seasons Hotel, Jackson Hole, Wyo. In 2007, it successfully petitioned the DOL for 118 H-2B workers, including clerks, kitchen workers, and housekeepers for the period December 1, 2007, to April 9, 2008; then the following season, they petitioned for an additional 118 workers to do the same jobs for the period May 1, 2008, to October 28, 2008, effectively providing them with year-round “seasonal” coverage encompassing 49 weeks of the year. Only a resort called the Four Seasons could consider that seasonal work. Although the Four Seasons pays relatively well, with H-2B salaries ranging from \$11 to \$15 per hour, the cost of living in and around Jackson Hole is quite high, and summer room rates start at \$695 per night for a standard room, and \$2,250 for a suite.

The Biltmore, Asheville, N.C. In 2008, the Biltmore earned DOL certification to import 157 guestworkers, including cooks, housekeepers, dining room attendants, and kitchen helpers for four-season work from April 1, 2008, to January 16, 2009. All were to be paid between \$6.28 and \$8.50 per hour. The Biltmore is the largest privately owned estate in America with 250 rooms. If you'd like to visit, admission tickets range from \$39 (low season) to \$55. If you manage a nice-sized hedge fund and want to stay at the four-star adjacent Inn on Biltmore Estate this summer, room rates start at \$619 per night, and the best suites start at \$4,000 per night.

The Westin La Cantera Resort, San Antonio, Texas. Petitioned for 100 housekeepers in 2007 for four-season work from January 18 to November 30, but was approved for only 50 to be paid \$6.75 per hour. In 2008, the resort was again approved for 50 housekeepers for the same dates, and gave them all a very stingy three-cent raise, bringing them up to \$6.78 per hour. La Cantera was also approved for an additional 25 kitchen helpers for the same dates, to be paid \$6.75. Presumably, if they were asked back for this year, they may have been eligible for the same three-cent per hour raise that the housekeepers got. Standard rooms at the resort will set you back at least \$259 per night.

Park Hyatt Beaver Creek Resort and Spa, Beaver Creek, Colo. Certified by the DOL to in-source 70 jobs to H-2Bs in 2008, for four-season work from June 15,

2008, to April 15, 2009. Positions filled included 15 kitchen helpers and 25 housekeepers paid \$10.50 per hour and 25 waiters/waitresses paid \$9.21 per hour. Room rates for weekends in January go for \$495 and up.

Ritz Carlton, New Orleans, La. In 2007, The New Orleans Ritz attempted to in-source 345 four-season jobs, paying between \$5.92 and \$9.75 per hour with H-2B labor for the period October 1 to June 30, but was denied DOL certification. The hotel tried again in 2008, and won DOL certification for the same dates, this time for 195 jobs, paying between \$6.15 and \$13.50 per hour.

Nantucket Island Resorts, Nantucket, Mass. This conglomerate of six small resorts won DOL certification for 298 workers in both 2007 and 2008, for the period March 15 to December 15, paying H-2B workers between \$8 and \$12 per hour. Rooms for summer weekends start at \$1,000 per night.

Luxury Hotels and Resorts. This company owns several high-end resorts around the country, and succeeded in earning certification to in-source 424 four-season jobs with overlapping petitions to ensure year-round H-2B labor coverage. Most of the jobs paid less than \$10 per hour, including some as low as \$6.79 per hour. Needless to say, none of the resorts in this group appear to be passing their H-2B labor savings on to their customers.

Americans Don't Want These Jobs?

The common stereotype about H-2B jobs is that they are the kind of backbreaking, low-paying, unskilled jobs that no red-blooded American would ever want. True, a majority of H-2B jobs are blue-collar and pay around \$10 per hour, and some are tedious, labor-intensive, dangerous, or all of the above. Yet there are also a significant number of H-2B jobs that pay well, and others that are actually quite good jobs. Below are some examples of jobs that received DOL labor certification to be made available to foreign H-2B workers for FY 2008.

- An immigration attorney named Kendra Kembel appears to specialize in the placement of high priced soccer coaches and sports instructors. Kembel won DOL labor certification to place 60 “head coaches,” 90 “professional scouts,” and “90 sports instructors” for the United Soccer Academy, based in New Jersey, for four-season work from February 4 to November 19, 2008, at a rate of \$21 per hour. Kembel also won DOL approval for U.K. Elite Soccer Inc.

Center for Immigration Studies

- in Cedar Knolls, N.J., to import 100 “sports instructors” for four-season work from February 11 to November 19, 2008, at a pay rate of \$20 per hour.
- The A-Team Connection, earned DOL labor certification to in-source 139 petroleum engineers in Baton Rouge, La., for four-season work from October 1, 2008, to August 1, 2009, at a pay rate of \$27.40 per hour.
 - The Aspen Ski Company earned DOL certification to in-source 184 ski instructors with H-2B visas for three-season jobs from October 1, 2008, to April 30, 2009, at pay grades between \$28.55 and \$34.45 per hour.
 - Henkels & McCoy Inc. of Blue Bell, Pa., earned DOL certification to in-source 75 electrician jobs in Missouri that paid \$32.38 per hour for four-season work from April 1, 2008, to February 1, 2009.
 - Thiro USA, Inc., based in Newington, Conn., successfully petitioned DOL to in-source 50 line erector jobs, 113 line installer jobs, and 75 line repairer jobs at pay rates of \$37.56 to \$38.41 per hour. The petitions were overlapping, ensuring that Thiro had H-2B labor for four-season work with varying contract dates, including November 26, 2007, to July 26, 2008; March 14, 2008, to December 22, 2008; May 29 to February 28, 2009; and July 27, 2008, to May 27, 2009.
 - America’s Energy Company in Geismar, La., petitioned for 64 civil engineers, and won certification for 63, for four-season work from January 15 to November 15, 2008, at a pay rate of \$26.43 per hour.
 - The Irby Construction Company in Jackson, Mo., earned certification for 100 line installers for four-season work from April 1, 2008, to January 31, 2009 at a pay rate of \$24.50 per hour.
 - Professional Respiratory Care Services, Inc., in Phoenix, Ariz., won certification to in-source 50 respiratory therapist jobs paying \$24 per hour, for four-season labor, from October 10, 2008, to July 1, 2009.
 - Workforce Plus, an immigration/recruitment agency in Baton Rouge, La., earned certification to in-source 100 “structural steel worker” positions with H-2B labor. The jobs were for four-season work, from January 20 to November 20, 2008, and paid \$24 per hour.
 - R.F. in Mt. Arlington, N.J., was approved to in-source 39 construction jobs paying \$22.45 per hour for four-season work from March 5 to December 5, 2008.
 - Mickey’s Trucking Express, Inc., in Brookfield, Ill., won approval to import 40 tractor-trailer drivers at a pay rate of \$20.46 per hour for four-season work from October 15, 2007, to May 31, 2008. The following year, the prevailing wage was reduced for tractor-trailer drivers in Illinois, and Mickey’s accordingly brought in 39 new drivers and paid them the new prevailing wage of \$14.31 per hour for four-season jobs from October 1, 2008, to May 31, 2009. (State labor departments often receive pressure from big business to revise, i.e. lower, prevailing wage determinations, and this is probably what happened here.)

Finding Amigos: U.S. Recruiters

Many H-2B employers contract out their H-2B hiring efforts to U.S. recruiting companies that either recruit foreign nationals themselves or, more commonly, partner with recruiters in foreign countries to find workers. Some employers choose to contract out the entire recruitment process to companies like MJC Labor Solutions and Amigos Labor Solutions, which advertise themselves as “one-stop shops” that will handle everything from recruitment to navigating the legal process to actually bringing the workers to the U.S. worksite.

Some recruiters, often referred to as “body shops,” take matters one step further by actually petitioning directly for workers and then farming them out to other companies. These firms often charge end users up to double the hourly wage that they actually pay workers. For example, the website of MJC Labor Solutions says that, “on average, a laborer costs \$16 per hour ... this wage rate includes the worker’s compensation, tax matches, a payroll service fee, and a MJC Labor Solutions service fee.” MJC mostly places landscapers who are paid around \$8 per hour depending on their location.

A perusal of the Department of Labor’s Foreign Labor Certification Data Center reveals that many of the businesses filing H-2B petitions for foreign workers are body shops that have no actual “seasonal or temporary” need for labor. Companies like Seasonal Labor Solutions, Seasonal Employee Concepts, and Seasonal Resource Services can petition for large numbers of workers and then essentially sell them off to companies that either could not get their own H-2B workers or did not know how to do so. Given the fact that the H-2B has

an annual numerical cap, critics of body shops argue that they “hoard” workers and then drive up the price for everyone else. Bob Wingfield of Amigos Labor Solutions, which will file petitions in an employer’s name, but does not petition for workers directly, told that me body shops who petition directly are “screwing up the whole process for everyone.” Wingfield indicated that he didn’t think petitioning directly was “kosher,” but said that if “everyone else keeps doing it, I may have to consider it myself.”

A recent cable drafted by the American consulate in Monterrey, Mexico, one of the largest H-2B processing posts in the world, entitled “Misrepresentations by Staffing Agencies under the H-2B Temporary Worker Program,” sheds light on the problem. The consulate in Monterrey identified a “growing trend in which staffing agencies are petitioning for increasing numbers of H-2B temporary worker visas for needs that are neither temporary nor seasonal, but year-round.” The cable states that “since February 1, 2009, post [Monterrey] has found more than 60 cases in which H-2B petitions had to be sent back to USCIS with requests for revocation.” The cable also mentions staffing agencies petitioning for general laborers with low prevailing wages, and then farming those workers out to perform more specialized types of jobs, and called the agencies’ job descriptions and locations submitted in their petitions, “at best informed guesses.” Although the DOL requires agencies to specify the work locations where H-2B labor will be performed, Monterrey has found that numerous approved petitions do not contain specific information on where the actual H-2B work will be performed or for whom. The cable contains examples of fraud perpetrated by staffing agencies like GB Capital in St. Charles, Mo., and Workforce Plus in Baton Rouge, La., and concludes that staffing fraud “dilutes the benefits of the H-2B program for both H-2B employers and their beneficiaries and disadvantages U.S. workers who might want to compete for these jobs.”

I spoke with Carl Hemphill, the founder of MJC Labor Solutions, and he was very defensive about petitioning directly for workers. “It’s called sub-contracting, and it’s completely legal,” he said. Hemphill runs a website called www.latinlabor.com that has a “labor feasibility calculator” that I used in March 2009. The “calculator” allows you to enter in the number of workers you want, and, in my case, it computed that I could bring in Mexican workers for \$2.95 per hour. Presumably this is the cost above and beyond what I’d pay the workers, but it wasn’t clear from the website. Hemphill told me that he was “angry” at the government for “letting in so many illegals,” and then denying employers

the right to bring enough workers in legally. He also acknowledged that it’s “impossible” to predict exactly how many workers he’ll be able to place four or five months before the season begins, and that sometimes companies back out of agreements to place the workers he petitions for. This means that a body shop can petition for, say, 200 laborers, but might only be able to find jobs for a percentage of them. With the economy souring, the possibility of surplus H-2B workers is no longer far-fetched. Trying to convince H-2B recruiters that Americans will do some or even most of the jobs currently being done by foreign H-2B workers, however, may be a lost cause.

In June 2007, the *Washington Post* published a glowing article called “A Guestworker Program that Does Well by Migrants” about the H-2B program, but with a central focus on LLS (Latin Labor Solutions) International, a U.S. H-2B recruiter.³⁰ The article is essentially a lengthy advertisement for LLS, which calls itself one of the largest “movers of H-2B workers” in the United States, touting both the company, and the larger H-2B program as inherently fair. A look at the LLS website provides an interesting glimpse into how U.S. recruiters market the H-2B program to U.S. employers. The site’s FAQ page has two particularly revealing entries:

Q: I have workers who currently work for me. I know these workers are probably in the United States illegally, can I use the H-2B program in order to legalize them?

A: Workers must prove they have been living in Mexico for 12 to 18 months consecutively before they are eligible for a work visa. In addition they might also be requested to prove ties and solvency in Mexico.

Note that the answer isn’t a flat-out “no,” and that LLS doesn’t state that the law *requires* H-2Bs to prove ties to Mexico.

Q: Can a worker that I sponsor for a visa work for another company?

A: The worker can only work for the employer who was authorized. If a worker decides to work for another company, he or she risks the opportunity of ever receiving a U.S. work visa and, if caught by authorities, could be deported.

So the bottom line message to employers here is: don’t worry, your workers can’t quit on you, even if they want to.

All of the H-2B recruiters I spoke to have convinced themselves that Americans simply do not want to guard pools, mow lawns, wash dishes, or perform any number of other duties that manual labor occupations require. “Oh, sure, they might try it,” Bob Wingfield of Amigos Labor Solutions told me, speaking of landscaping jobs, “but by the second or third day behind the machine they’ll quit.” Wingfield is not alone in this opinion, despite the fact that Americans *are already* doing almost every type of H-2B job imaginable. I asked another H-2B recruiter, who did not want me to use his name, about some of the high wage jobs that were going to H-2B workers. “Americans don’t like soccer!” he snapped, when I asked him about the 240 coaches, scouts, and instructors being imported from abroad and paid \$21 per hour by the American Soccer Academy in New Jersey. “If Americans don’t like soccer, why is there a need for 240 coaches, scouts and instructors?” I asked. “Damned if I know,” he said.

A Different Way

Even in an industry like landscaping, which may rely on H-2B workers more than any other, you can still find Americans toiling away anonymously behind lawn mowers and hedge clippers in many American towns and cities. This spring, I met a crew of Americans working for a landscaping company called All American Lawn Services, Inc., in Denver, Colo., who found my interest in their company, and the fact that they were Americans willing to mow lawns, peculiar to say the least. I was out for a walk in the city’s Washington Park neighborhood and just happened to bump into them as they were leaving a job. They were all in their early to mid-twenties, and to them, there was nothing unusual, demeaning, or shameful about their work, and rightfully so.

I tried to find this company on the Internet and was surprised to learn that there are actually numerous landscaping companies all around the United States with names like All American Landscaping or All American Lawn Services in places like Oklahoma City; Fair Lawn, N.J.; Vero Beach, Fla.; Gilbert, Ariz.; Nebraska City; and in the suburbs of Chicago. Of the numerous landscaping companies around America using some variation on the “All American” name, I could find only one in the Department of Labor’s H-2B database — a company called All American Maintenance in Colorado Springs that earned DOL certification to in-source 30 landscaping jobs to H-2Bs in 2008. Of course, having a patriotic sounding business name can also be a smokescreen, as appears to be the case with a recruiting agency that absurdly calls itself U.S. Americans, Inc.

U.S. Americans, Inc., according to the DOL Foreign Labor Certification database for FY 2008, served as the agent for 173 H-2B petitions, and won DOL approval to in-source 1,367 American jobs to H-2B guestworkers in 2008.

I spoke to employees and managers at a few of the All American landscapers and heard a completely different picture from that painted by the recruiters and other landscaping companies that were heavy users of the H-2B program. Don Mullanack from All American Lawn Services in Vero Beach, Fla., told me that in 22 years he had never needed to in-source jobs to H-2Bs. While many of his competitors hire illegals or use H-2B labor, Don hires Americans: white Americans, black Americans, Mexican Americans, Cuban Americans — Americans all the same. “I can’t compete on price with those companies,” he said, referring to those that use H-2Bs and/or illegals, “but I get business based on providing good service, and people like to do business with a company that hires Americans,” he said, adding that “we’ve got too many unemployed people — we’ve got to put them to work, before looking for people outside the country.” Don pays his workers \$12 per hour, and usually has a list of Americans 15-20 deep waiting to work for him. “A man cannot support his family on \$7 or \$8 an hour, its hard enough at \$12,” he said.

Foreign Recruiters

Despite convincing evidence that the presence of H-2B workers in the United States has a negative impact on U.S. workers, it’s important to acknowledge that the vast majority of H-2B guestworkers are basically good people who are in the United States to work and save money to improve the lives of their families at home. As a consular officer serving at American embassies overseas, I’ve interviewed numerous H-2B visa applicants and I met several more in researching this report. While I do not buy the notion that H-2Bs are a “last resort” for employers that cannot find workers, it is also clear that an H-2B worker from a developing country is obviously going to perceive a \$7 per hour job at a hotel or on a construction site as a better career opportunity than an American born and raised in the United States will. That does not necessarily mean that Americans cannot or will not do the job, it just means they may not bring the same kind of enthusiasm and obedience to their employers as H-2B workers who are contractually tied to their employers for their legal status in the United States. An American in a lower-wage hourly job knows that his income puts him in the low end of the socioeconomic status spectrum; whereas the wages many H-2B workers earn puts them near the top of the wage-earning spectrum in their

home countries, and they can return home like conquering heroes, highly valued in their extended families and wider communities, and often prized as prime marriage candidates.

Recruiting H-2B workers in their home countries is big business and it's a buyers market for brokers looking to secure workers, as there is never a shortage of people looking to work in the United States. In my experience as a consular officer, I noticed that no matter what country you go to, there is always a brisk trade in hearsay and misinformation regarding American visas. Visa applicants are often more likely to formulate viewpoints on U.S. visa laws and regulations from shady middlemen or random people than from the relevant U.S. embassy website. Many H-2B visa applicants know almost nothing about the jobs they will be doing in the United States, let alone U.S. visa laws. This lack of knowledge and the desperation of many visa applicants creates a fertile ground for unscrupulous recruiters who can smell opportunity more acutely than a vulture can smell a fresh carcass.

Recruiters entice their prey with often exaggerated claims of what they can earn in the United States and how life will be there, and then once the recruit is hooked, they demand whatever price they think they can command, sometimes "only" \$1,500, but occasionally up to \$20,000. Recruiters want to provide employers with workers who will complete their full tours of duty, so they often require workers to leave collateral, sometimes in the form of a deed to a house or car. In some cases, this collateral is to ensure that the worker completes his contract, while in others, it's because the worker still has to pay the broker its finder's fee. H-2B program regulations state that petitions will be denied if the petitioner "knows or reasonably should know that the beneficiary has paid or agreed to pay any facilitator, recruiter, or similar employment service as a condition of obtaining an H-2B offer." However, this provision can be overcome if the employer repays the fee or notifies USCIS within two working days of finding out about the payments. Practically, very few H-2B workers ever recover the recruiting fees they've paid to headhunters in their home countries, and most companies get away with pleading ignorance.

In order to understand how foreign recruiters can get away with such abuses, one needs to fully digest how desperate people in the developing world are to have an opportunity to work in the United States. Enter the phrase "work in the USA" into Google and you'll see 148 million results. Talk to any American who has spent time living in a developing country with high unemployment and low wages, and ask them how of-

ten they were asked about how to get a visa to work in the United States. As Americans, we tend to forget how badly others want to live here; recruiters, on the other hand, see the desperation every day and they use it to squeeze migrants for as much as they can get.

Guestworker or Intending Immigrant?

Unlike skilled H-1B applicants, H-2B applicants have to prove to a U.S. consular officer during the context of a visa interview that they have a residence abroad that they intend to return to. Section 214(b) of the U.S. Immigration and Nationality Act states "every alien shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for admission, that he is entitled to a nonimmigrant status." This section of the law gives consular officers at U.S. embassies and consulates wide latitude to refuse any applicant who cannot overcome the presumption that he intends to immigrate. The law places the burden of proof squarely on applicants, meaning that they are guilty of being intending immigrants until they can prove their innocence. Given the fact that most H-2B applicants are unemployed in their home countries, and generally have very little savings or career prospects at home, one would think that it would be very difficult for H-2B applicants to get their visas.

The reality in the field, however, is that very few H-2B visa applicants are refused as intending immigrants. I explored the issue of high visa issuance rates in a CIS *Backgrounder* called "No Coyote Needed."³¹ Although that report dealt primarily with tourist visa issuance, the same principles apply to H-2B visa applicants. Applicants are given the benefit of the doubt as workers who are at least trying to "do it the right way" (as opposed to illegals), and posts are often too inundated with applicants to have time to investigate suspect applicants and petitioners, let alone deal with the avalanche of pressure and complaints that inevitably accompany visa refusals.

The State Department does not release refusal rates for H-2B visas, or even break down how many were issued by country, but consular officers from busy H-2B posts have told me that the vast majority of H-2B visa applications are approved. Mexico, which is far and away the largest source of H-2B labor, likely has one of the highest H-2B issuance rates, probably ranging between 85-90 percent, whereas posts significantly further from the United States might issue visas to somewhere between 70-80 percent of H-2B applicants.

The primary reason for this disparity is that it costs Mexican workers far less to get to work sites in

the United States than it would for workers in Asia or Europe, who often pay much higher finder's and transport fees to their recruiters. In essence, it's simply more plausible and economically viable for Mexican workers to come to the United States for seasonal work than it is for say, Ukrainians, who, having invested far more and traveled further, might be more inclined to overstay their visas. At least this is the popular wisdom in State Department circles. Sadly, we have no way of quantifying how significant the H-2B overstay problem is because DHS still has no reliable entry/exit tracking system. Anecdotal evidence, however, indicates that the H-2B overstay problem is significant, and will become worse as H-2B workers begin to realize that without the exemption for returning (H-2R) workers, they are much less likely to be able to return to the United States to work year after year. Many H-2B employers also have presented the returning worker exemption debate as forcing them to choose between hiring illegals or going out of business. No one should be surprised if companies that cannot bring their H-2Bs back legally encourage them to overstay their visas, or apply for visitor's visas and then hire them back to work for them "off the books."

Abuse of H-2B Workers

It's extremely difficult to estimate how prevalent employer abuse of H-2B workers is, but there have been enough disturbing incidents involving major H-2B employers to conclude that abuse is a significant problem that the U.S. government has not addressed in any comprehensive fashion. Abuse can take many forms — and ranges from minor violations, such as shortchanging employees on their hours or overcharging them for their accommodations, to far more serious violations that border on human trafficking and indentured servitude.

Make no mistake — most H-2B employers are not abusing their employees, and many of the H-2B workers that I have interviewed have nothing but good things to say about their work experiences in the United States. Still, the persistence of reports of abuse, and the fact that so little has been done to address the issue is cause for serious concern. To date, neither the Department of Labor, nor the Department of Homeland Security has *ever* barred any U.S. company or recruiter from filing H-2B petitions, and indeed some abusers continue to have their H-2B petitions approved to this day. Clearly a significant part of the problem is that H-2B workers arrive in the United States in a very vulnerable position due to the following factors: many speak little or no English, they arrive in the United States deeply in debt after having paid off a recruiter to get the job

in their home country, their legal status is tied to their U.S. employer, they hold few legal rights, and they often have left behind collateral (deed to a house or car title for example) with their recruiter to ensure that they will complete their contract. The examples of abuse allegations that follow afford us a glimpse into the kinds of exploitation that H-2B workers can be subject to.

Signal Corporation, Mobile, Ala. Hundreds of skilled, Indian pipe fitters and welders allegedly paid their life's savings to recruiters that promised them high-paying jobs and green cards in the United States, only to find themselves working in gulag-like labor camps where they were subject to abuse and threats by their American employer. The workers are now part of a class action lawsuit against the company and the Justice Department has opened an investigation, but the U.S.-based recruiter involved in the case, Global Resources, still had hundreds of H-2B petitions approved by the DOL in FY 2008, as did Signal's immigration attorney, Malvern Burnett. Executives from Signal remain politically engaged, making Fall 2008 campaign contributions to Rep. Gene Taylor (D-Miss.), and Sen. Roger Wicker (R-Miss.).

Eller and Sons Trees, Franklin, Ga. Some 3,000 forestry workers have joined a class action suit alleging that they've been cheated out of wages and were paid less than the minimum wage with no overtime pay.³² The workers have already won a summary judgment decision that the company violated their rights under the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Protection Act.³³ Nonetheless, Eller and Sons remains one of the country's largest users of the H-2B program, with the DOL certifying some 865 H-2B worker labor certifications in FY 2008.

Alpha Services, Hickory, Miss. Settled a lawsuit with a group of 500 H-2B forestry workers who alleged that Alpha Services failed to pay them prevailing wages and overtime.³⁴ The DOL approved labor certification requests for Alpha Services to import 270 H-2B workers in FY 2008; as of May 2009, the company listed no jobs available on its website.

Shores and Ruark Seafood, Urbanna, Va. This company was fined twice by the DOL for failing to pay its H-2B workers the minimum wage. A group of 51 H-2B workers sued the company for back pay and won a \$150,000 settlement.³⁵ Nonetheless, DOL approved labor certifications for the company to employ 55 H-2B fish bin tender workers from September 1, 2008, to June 30, 2009, at exactly the prevailing wage of \$6.55 per

hour. Shores and Ruark's petition was submitted by SSB board member, Más Labor.

Brickman Group, Gaithersburg, Md. In 2008, a federal judge in the U.S. District Court in Philadelphia ruled that Brickman had to pay back wages to more than 100 H-2B employees for making visa, broker, and transportation deductions from their paychecks that brought their wages below the minimum wage. Brickman continues to have their petition requests approved by the DOL to this day.

Conclusion

The debate over H-2B visas is complex, and those on the polar opposite ends of it are both right and both wrong. Critics of the program often fail to acknowledge that: 1) it can be difficult (though not impossible) for American employers, especially truly seasonal ones, to recruit competent, reliable American staff, even during a recession; 2) some, though definitely not all, of the available American labor pool lacks the kind of motivation, skills, dedication, and flexibility that foreign H-2B labor can offer; 3) most H-2B workers and employers are good, honest people trying to make a living for their families and, while some employers are definitely guilty of abusing their workers, most are not; 4) H-2B workers and employers are at least part of the legal economy, contributing to our tax base, in stark contrast to illegal workers and those who employ them; 5) when Americans who aren't students take truly seasonal jobs, they sometimes cannot find work the rest of the year and end up using unemployment compensation and other public services; and 6) if the H-2B program were abolished, some businesses would struggle to compete, and some might go out of business.

On the other side of the debate, supporters of the H-2B program often refuse to accept that: 1) one of the primary reasons why H-2B employers have a hard time finding American staff is not because Americans don't want to work, but because Americans cannot support their families on low-wage, no-benefit jobs; 2) despite the fact that many (though not all) H-2B jobs offer low wages, and no benefits, many of these jobs could still be filled with legal American workers; 3) jobs that last nine or 10 months each year are not "seasonal;" 4) H-2Bs likely consume more in social services than they contribute in taxes, particularly because most receive no health care coverage from their employers; 5) H-2B employers' advertising and recruitment efforts in the United States are often pro-forma — too many employers assume that it's impossible to get American workers and don't really devote serious resources to trying; and

6) the H-2B program is particularly detrimental to less-educated Americans, minorities, and students, some of the most vulnerable segments of our economy.

While there are valid points on both sides of this debate, this report has focused more on the problems with the H-2B program, rather than the positive aspects of it, not because I want to tarnish the image of H-2B workers or those who employ them, but because the program, as it is currently operating, is rife with fraud and abuse that diminishes the entire system's integrity. My hope is that by pointing out all of the problems, we might be able to replace the current system with one that benefits truly seasonal employers, and does a much better job of ensuring that unemployed American workers don't lose out on jobs they would take and employed Americans do not have their wages depressed by guestworkers.

The present system is dominated by medium and large companies — many of whom are masquerading as seasonal employers — and recruiters who use their knowledge of the system to squeeze smaller companies that would like to use the system, but don't have the resources or inside knowledge on how to secure H-2Bs. Very few truly small, or truly seasonal employers can afford to use the lawyers and recruiters needed to navigate the current needlessly complex H-2B program. While President Obama and nearly every other American politician is quick to denounce companies that outsource American jobs, few politicians are willing to denounce companies that in-source American jobs here at home with foreign labor. Acknowledging the problems associated with in-sourcing American jobs at home with guestworkers does *not* mean "scapegoating" foreign workers — it simply means bringing an important debate out into the open for examination. It's time to get serious about trying to repair our broken guestworker system, and if we are not prepared to devote the resources necessary to restoring some integrity to the program, it should be ended. If the H-2B program is to continue, the following policy recommendations would help restore some measure of fairness to a system tarnished by fraud and abuse.

Policy Recommendations

- Deny all H-2B petitions from recruiters and staffing agencies that do not directly employ H-2B workers. These middlemen have no need for seasonal labor and simply use their knowledge of the system to hoard labor, thereby driving up the cost and making it more difficult for legitimate seasonal employers to secure workers.

Center for Immigration Studies

- Don't allow companies that employ at least 50 workers to petition for H-2B workers that would exceed 25 percent of their total workforce. For example, petitioner with 1,000 full- and/or part-time employees should petition for no more than 250 H-2Bs per fiscal year.
- Streamline and simplify the entire H-2B filing process so that smaller employers that do not have immigration attorneys can navigate the process themselves. A brief glance at the DOL's outline³⁶ reveals how needlessly complex the entire process is.
- Restore the "seasonal" concept of the H-2B visa by reducing the maximum initial petition validity from 10 to six months; employers that need workers during all four seasons are not truly seasonal.
- Reinforce the "seasonal" nature of the program further by barring companies that file "overlapping" petitions that effectively give them year-round "seasonal" workers.
- Restore the "temporary" nature of the H-2B visa by discontinuing visa extensions, which currently allow visa holders to remain in the United States for up to three consecutive years. H-2B employers that have permanent staffing "shortages" need to develop long-term plans to correct their problem, rather than permanently relying on importing foreign guestworkers.
- Prevent companies that have laid off U.S. workers in one fiscal year from filing any H-2B petitions the following fiscal year.
- Refuse H-2B petitions to place workers in high-unemployment regions of the United States.
- Devote significantly more resources to scrutinizing labor certification petitions to combat fraud.
- Devote significantly more resources to regulating H-2B employers' treatment of guestworkers to ensure that they are being paid the wage guaranteed on the petition, and that the employer is following all other program regulations.
- Require the Departments of Labor and Homeland Security to perform a comprehensive analysis of the prior year's database of H-2B petitions to spot irregularities and fraud and prevent abusers of the program from using it again the following year.
- Inform H-2B visa holders of their rights and provide a user-friendly way for them to report any malfeasance on the part of the employer to the Department of Labor, while reassuring the guestworkers that their names will not be forwarded to the employer if they file a complaint.
- Permanently bar all companies that file fraudulent petitions or abuse the rules of the program or the workers themselves from using the H-2B program. This would include companies that are sued in U.S. courts by their H-2B employees for violations of the H-2B program's terms, if the employer is found liable.
- Completely overhaul the local recruitment/advertising requirements of the program to make it easier for Americans to find jobs that otherwise would go to H-2B workers, with the following steps: 1) use the government's own website, www.usajobs.com, or the DOL website to advertise jobs that employers want to open up to H-2Bs. If a sufficient number of Americans apply for these jobs, the labor certification should be denied; 2) publicize this website, and these job opportunities at unemployment offices and on the various state websites where Americans file online unemployment claims; 3) rather than requiring employers to run two "compliance" ads in a local newspaper, require companies to provide evidence that they devoted at least \$100 in paid recruitment advertising per employee that they are petitioning for. An employer that wants to in-source 100 jobs, would need to present evidence of a \$10,000 ad campaign devoted to recruiting American workers.
- Provide federal and state incentives and logistical support to private H-2B recruitment agencies to help them refocus their businesses from finding workers in high-unemployment foreign countries, to high unemployment towns and cities in the United States. State workforce agencies also need to help private seasonal businesses form recruiting partnerships with firms from different industries in other parts of the country. For example, ski resorts in the Rockies and New England and snowbird retreats in Arizona and Florida should be partnering with amusement park operators and lifeguard agencies in the Northeast and upper Midwest to recruit American workers willing to divide their time between seasonal employers.

End Notes

¹ Department of Labor Foreign Labor Certification Data Center Online Wage Laboratory, FY 2008 and FY 2007, H2-B Program Data, <http://www.flcdatacenter.com/CaseH2B.aspx>.

² Ross Eisenbrey, vice president, Economic Policy Institute, FDCH congressional testimony, April 16, 2008 on seasonal worker visas, http://www.epi.org/page/-/old/webfeatures/viewpoints/20080416-eisenbrey-judiciary_committee_testimony.pdf.

³ http://www.uscis.gov/files/nativedocuments/h2a_h2b_eligible_countries.pdf.

⁴ Matthew Hay Brown, "In Visa Dispute, Businesses Face Summer Worker Gap," *Baltimore Sun*, March 24, 2008, http://www.ewic.org//index.php?option=com_content&task=view&id=48.

⁵ Tim Logan, "Visa Program not Delivering as Many Imported Workers," *St. Louis Post-Dispatch*, April 17, 2008, http://www.h2bworkforcecoalition.com/pdf/news/MO-Visa_program_not_delivering.pdf.

⁶ Paul Frumkin, "Debate Over H-2B Visa Cap Threatens Serious Shortage of Seasonal Workers," *Nation's Restaurant News*, March 17, 2008, http://www.h2bworkforcecoalition.com/pdf/news/NA-Debate_over_H-2B_visa_cap.pdf.

⁷ Charles Simon, "What Now? Smart Strategies to Survive and Perhaps Even Prosper in Spite of the Delay or Loss of H-2B Workers," *Landscape Management*, January 2008, <http://www.landscapemanagement.net/landscape/Cover+Story/Cover-Story-What-now/ArticleStandard/Article/detail/485100>.

⁸ Sen. Barbara Mikulski, "Saving Our Small, Seasonal Businesses Means Fighting to Preserve H-2B Visas," *The Hill*, February 13, 2008, <http://thehill.com/op-eds/saving-our-small-seasonal-businesses-means-fighting-to-preserve-h2b-visas-2008-02-12.html>.

⁹ Library of Congress Thomas, S338, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN00388:@@P>.

¹⁰ *Ibid.*, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR01934:@@P>.

¹¹ Lynn Rhinehart, associate general counsel, AFL-CIO, congressional testimony before the Subcommittee on Commercial and Administrative Law, U.S. House of Representatives, February 4, 2009, <http://judiciary.house.gov/hearings/pdf/Rhinehart090204.pdf>.

¹² See DOL guidelines on this incredibly complex process at <http://www.foreignlaborcert.doleta.gov/h-2b.cfm>.

¹³ <http://www.savesmallbusiness.org/>.

¹⁴ Department of Labor Foreign Labor Certification Data Center Online Wage Laboratory, FY 2008, H2-B Program Data, <http://www.flcdatacenter.com/Case-H2B.aspx>.

¹⁵ <http://www.grandhotel.com/employment.html>.

¹⁶ S. Mitra Kalita, "U.S. Deters Hiring of Foreigners as Joblessness Grows," *Wall Street Journal*, March 27, 2009, <http://online.wsj.com/article/SB123810912615352681.html>.

¹⁷ Department of Labor Foreign Labor Certification Data Center Online Wage Laboratory, FY 2008 and FY 2007, H2-B Program Data, <http://www.flcdatacenter.com/CaseH2B.aspx>.

¹⁸ U.S. Chamber of Commerce Policy Priorities for 2009, <http://www.uschamber.com/NR/rdonlyres/ew-cf77gtns56wqcumec2j52edwrtcmsbx2ka355dzofgir5y-563qxd2jhcb5xprvqkharfraabry75oqihqneldfjxc/0901priorities.pdf>.

¹⁹ http://www.ewic.org//index.php?option=com_content&task=view&id=48.

²⁰ Includes H-2R visas during 2005-7 period when "returning" H-2B workers did not count against annual cap. Figures also include H-2B renewals.

²¹ Associated Press, "School Gets 700 Applicants for Janitorial Job," March 7, 2009, <http://www.msnbc.msn.com/id/29574766/>.

Center for Immigration Studies

- ²² <http://www.mexican-workers.com/mexican-workers.htm>.
- ²³ Devah Pager, "The Mark of a Criminal Record," *American Journal of Sociology*, March 2003, <http://www.northwestern.edu/ipr/publications/papers/2003/pagerajs.pdf>.
- ²⁴ "H-2B Cap Reached for First Half of FY 2009," American Hotel and Lodging Association website, July 30, 2008, <http://www.ahla.com/advisory.aspx?id=23054>.
- ²⁵ Steven Camarota and Karen Jensenius, "Trends in Immigrant and Native Employment," Center for Immigration Studies *Backgrounders*, April 2009, <http://cis.org/FirstQuarter2009Unemployment>.
- ²⁶ Ross Eisenbrey, vice president, Economic Policy Institute, congressional testimony, April 16, 2008, http://www.epi.org/page/-/old/webfeatures/viewpoints/20080416-eisenbrey-judiciary_committee_testimony.pdf.
- ²⁷ Adrienne Hill, "Swine Flu, Sick Days, and Food Service," Chicago Public Radio, May 5, 2009, <http://www.chicagopublicradio.org/Content.aspx?audioID=33962>.
- ²⁸ Congressional Testimony, Ross Eisenbrey, vice president, Economic Policy Institute, April 16, 2008, http://www.epi.org/page/-/old/webfeatures/viewpoints/20080416-eisenbrey-judiciary_committee_testimony.pdf.
- ²⁹ <http://www.flcdatcenter.com/CaseH2B.aspx>.
- ³⁰ Krissah Williams, "A Guestworker Program that Does Right by Migrants," *The Washington Post*, June 26, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/25/AR2007062502016.html>.
- ³¹ <http://www.cis.org/articles/2008/back208.html>.
- ³² Laura Parker, "Guestworkers Sue Companies Over Pay," *USA Today*, November 15, 2006, http://www.usatoday.com/news/nation/2006-11-14-guest-workers_x.htm.
- ³³ *De-Leon-Granados v. Eller and Sons Inc.*, 497 F. 3d 1214 (11th Cir. 2007).
- ³⁴ Melissa McGrath, "Coeur d'Alene Firm Settles Labor Lawsuit," *Idaho Statesman*, November 16, 2006.
- ³⁵ Lawrence Latane III, "Fifty One Workers Will Be Paid Back Wages," *Richmond Times Dispatch*, July 10, 1999.
- ³⁶ <http://www.foreignlaborcert.doleta.gov/h-2b.cfm>.

Backgrounder



Center for Immigration Studies
1522 K Street, NW, Suite 820
Washington, DC 20005-1202
(202) 466-8185
center@cis.org
www.cis.org

NON-PROFIT
U.S. POSTAGE
PAID
PERMIT # 6117
WASHINGTON, DC

Dirty Work In-Sourcing American Jobs with H-2B Guestworkers By David Seminara

Despite the significant impact that the H-2B visa program has on American workers, the program receives scant media coverage compared to other guestworker categories. Issues surrounding the issuance of H-1B visas, for example, tend to receive far more media scrutiny because the beneficiaries and the victims are highly educated and often fall within the same social circles as journalists, and the topic of higher-paying skilled jobs is perceived to be more relevant to the kind of readership and viewership that advertisers desire. As the global recession continues to take its toll on the American economy to the tune of 600,00-plus job losses each month, this is an opportune time to re-examine the H-2B process and to evaluate whether these jobs could be filled with people already in the United States.

The goal of this report is to shed light on the poor conditions that H-2B guestworkers often toil in; to expose the damage that this program does to the most vulnerable sector of American workers: the poorly educated, students, minorities, and legal immigrants; to examine the recruiters who find workers and the employers who hire them; and to scrutinize the government's role in sanctioning and managing the H-2B bureaucracy.

Center for Immigration Studies
1522 K Street, NW, Suite 820
Washington, DC 20005-1202
(202) 466-8185 • (202) 466-8076
center@cis.org • www.cis.org

Support the Center through the Combined Federal Campaign
by designating **10298** on the campaign pledge card.