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The Protecting U.S. Workers Initiative

Ensuring that 'U.S. workers have the advocate they need at the highest level'

By Andrew R. Arthur

Summary

- In Executive Order 13788, "Buy American and Hire American", President Trump directed the secretary of State, the attorney general, the secretary of Labor, and the secretary of Homeland Security to protect the interests of U.S. workers in the administration of our nation's immigration system, including by preventing fraud or abuse.

- Through the Protecting U.S. Workers Initiative, which was launched in 2017, the Immigrant and Employee Rights Section of the Department of Justice's Civil Rights Division is cracking down on employers who are abusing temporary visa programs to deny U.S. workers job opportunities.

- Under that initiative, the Immigrant and Employee Rights Section has launched dozens of investigations, filed at least one lawsuit, and reached eight settlements with employers, resulting in agreements by employers to pay a combined total of more than $1.2 million in back wages to affected U.S. workers and civil penalties to the United States.

- It has partnered in this initiative with other federal government agencies, entering into memorandums of understanding with the Bureau of Consular Affairs at the State Department, U.S. Citizenship and Immigration Services at the Department of Homeland Security, and the Employment and Training Administration at the Department of Labor. The predecessor to the Immigrant and Employee Rights Section, the Office of Special Counsel for Immigration-Related Unfair Employment Practices, had previously entered into an MOU with the Labor Department's Wage & Hour Division in January 2017 that addressed information sharing within the respective agencies areas of jurisdiction.

- U.S. Citizenship and Immigration Services and the Wage and Hour Division also have procedures by which individuals can report fraud and abuse in temporary worker programs. This Backgrounder contains contact information for each of these initiatives.

Introduction

With the virtual shutdown of much of the U.S. economy, American workers are hurting, and jobs are scarce. Fortunately, there are a number of agencies that are on their side with programs to ensure that they are not being passed over for employment by businesses that are abusing the temporary worker visa programs to bring in cheap labor from abroad.

In a March 23, 2019, blog post,[1] I discussed the work of one such program, the "Protecting U.S. Workers Initiative", which was launched by the Immigrant and Employee Rights Section (IER)[2] in the Civil Rights Division (CRT)[3] of the Department of Justice (DOJ) in 2017. Understanding that initiative, and the work of IER and its

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agency partners, can assist U.S. workers by informing them how they can use the tools at the disposal of each of those agencies to protect their employment rights against unscrupulous employers.

IER

IER is the successor to the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC).[4] Section 102(c) of the Immigration Reform and Control Act of 1986 (IRCA), which was enacted on November 6, 1986, directed the president to appoint a Senate-confirmed Special Counsel for Immigration-Related Unfair Employment Practices within the Department of Justice to enforce the then-new section 274B of the Immigration and Nationality Act.[5]

In 1994, then-Attorney General (AG) Janet Reno moved OSC, which had previously been an independent office in DOJ reporting to the associate attorney general, to CRT, where it is a section under the CRT head, an assistant attorney general.[6] Effective January 18, 2017, that office's name was changed to the Immigrant and Employee Rights Section.[7]

The Anti-Discrimination Provisions in Section 274B of the INA

Anti-discrimination provisions related to immigration in Section 274B of the INA[8] were added to that act by section 102(a) of IRCA,[9] and amended by section 535 of the Immigration Act of 1990 (IMMACT 90).[10]

As originally implemented, section 274B of the INA prohibited discrimination against any individual, other than an "unauthorized alien" (that is, an alien who was not a lawful permanent resident or who lacked employment authorization), in "hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment" because of that individual's national origin or "in the case of a protected individual", citizenship status.[11]

"Protected individuals" for purposes of citizenship-status discrimination are citizens and nationals of the United States, lawful permanent residents, aliens who have temporary resident status under the IRCA amnesty provision, refugees, and asylees.[12] Collectively, these individuals are known as "U.S. workers" or "American workers".

It should be noted, however, that under section 274B(a)(4) of the INA, it is not an "unfair immigration-related employment practice" for an employer to hire a citizen or national of the United States over an equally qualified alien.[13] And, among other exceptions, these rules do not apply to employers with three or fewer employees,[14] although they may still be subject to prosecution for visa fraud relating to temporary workers.[15]

Section 535 of IMMACT 90 added an additional prohibition, which is found at section 274B(a)(6) of the INA.[16] That provision makes it an unfair immigration-related employment practice for an employer or other entity, in satisfying the employment-verification provisions of section 274A(b) of the INA,[17] to request "more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine."[18] This violation is colloquially known as "document abuse".

As I have previously explained:

> *In other words, employers were forced to accept any document an employee offered that satisfied the employment-eligibility verification provisions of section 274A so long as they "reasonably appear[ed] to be genuine", or face the wrath of the federal government. As a law clerk, I drafted some of the leading decisions interpreting section 274B, and even I have no idea what Congress meant by that clause.*
>
> *This scared off many would-be compliant employers, and gave unscrupulous ones an easy out. It also spawned an entire fraudulent-document industry for unauthorized aliens.*[19]

EO 13788: "Buy American and Hire American"

On April 18, 2017, President Trump issued Executive Order (EO) 13788, "Buy American and Hire American."[20] Section 2(b) of that EO states:

> *Hire American. In order to create higher wages and employment rates for workers in the United States, and to protect their economic interests, it shall be the policy of the executive branch to rigorously enforce and administer the laws governing entry into the United States of workers from abroad, including section 212(a)(5) of the Immigration and Nationality Act.*[21]

The referenced provision, section 212(a)(5) of the INA, bars any alien from receiving a visa to come the United States to perform skilled or unskilled labor unless the Department of Labor (DOL) determines and certifies to the Department of State (DOS) and the Department of Homeland Security (DHS) that:

> *(I) there are not sufficient workers who are able, willing, qualified ... and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and*
>
> *(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.*[22]

As my colleagues Preston Huennekens and Bryan Griffith explained the process for obtaining a temporary guestworker visa in the context of the H-2B, unskilled guestworker nonimmigrant visa category:

> *There are three steps to the H-2B process.*
>
> *First, an employer petitions [DOL] for a foreign labor certification. At this stage, employers apply for foreign laborers, sometimes hundreds or even thousands of them. They are required to show that they have a "temporary need" for these workers, that they will pay the prevailing or other appropriate wage, and that they have made some effort to recruit U.S. workers.*
>
> *There are many definitional loopholes that employers can use to access the program, and most are assisted by labor brokers. In 2017, [DOL] approved 81 percent of all petitions for H-2B laborers, similar to the 2016 approval rate of 83 percent.*
>
> *Second, the employer submits an I-129 form to U.S. Citizenship and Immigration Services (USCIS). This form is used for all instances of requesting foreign labor.*
>
> *Finally, prospective alien workers apply for the H-2B visa, usually at a consulate in their home countries. They may remain for the period of stay approved in their labor certification, generally for no more than one year and in one of the two seasons. Some workers are approved for temporary jobs with more than one employer in different seasons, usually with the help of labor brokers, and are not counted twice even though they work in both seasons.*[23]

Needless to say, there are economic incentives for unscrupulous employers to game this system to petition for foreign workers in lieu of paying higher wages to equally skilled U.S. workers. To limit these and other abuses, section 5(a) of EO 13788 directs the secretary of State, the attorney general, the secretary of Labor, and the secretary of Homeland Security to "issue new guidance ... to protect the interests of United States workers in the administration of our immigration system, including through the prevention of fraud or abuse."[24]

Protecting U.S. Workers Initiative

In line with EO 13788, in 2017, CRT launched the "Protecting U.S. Workers Initiative".[25] As CRT has explained:

> *When employers abuse temporary visa programs, U.S. workers miss job opportunities. ... The [Protecting U.S. Workers] Initiative focuses on combating employment discrimination against U.S. workers. ... The Division uses traditional tools of investigation, lawsuits, outreach, and interagency coordination to fight employer preferences for temporary visa holders, while educating U.S. workers on their rights. CRT uses a multi-pronged approach to ensure that U.S. workers can seek and retain jobs without regard for their citizenship status or national origin. The Division holds companies accountable for discriminating against U.S. workers by paying fines, paying affected workers their lost wages, and deterring companies from using illegal preferences.*[26]

IER has launched dozens of investigations under this initiative, filed at least one lawsuit, and reached eight settlements with employers (described below).[27] As a result of that initiative, "employers have agreed to pay or have distributed a combined total of more than $1.2 million in back pay to affected U.S. workers and civil penalties to the United States."[28]

At the time the first lawsuit was filed under that initiative, then-Attorney General Jeff Sessions made clear:

> *"In the spirit of President Trump's Executive Order on Buy American and Hire American, the Department of Justice will not tolerate employers who discriminate against U.S. workers because of a desire to hire temporary foreign visa holders. ... The Justice Department will enforce the Immigration and Nationality Act in order to protect U.S. workers as they are the very backbone of our communities and our economy. Where there is a job available, U.S. workers should have a chance at it before we bring in workers from abroad."*[29]

Partnerships with and Efforts by Other Executive-Branch Agencies

CRT has entered into a number of partnerships with other executive branch agencies to carry out IER's mandate under the Protecting U.S. Workers Initiative.

On October 11, 2017, CRT entered into a memorandum of understanding (MOU) with the Bureau of Consular Affairs (BCA) at DOS.[30] BCA is responsible for formulating and implementing policy relating to immigration overseas,[31] and in particular for issuing visas, including employment-based visas, abroad.[32]

The purpose of that MOU is to allow the agencies to "share information about employers that may be engaging in unlawful discrimination, committing fraud, or making other misrepresentations in their use of employment-based visas, such as H-1B, H-2A, and H-2B visas," and to facilitate information sharing in an effort to help" IER and BCA advance their individual missions.[33]

Subsequently, on May 11, 2018, CRT and USCIS entered into an MOU enhancing "their collaboration to better detect and eliminate fraud, abuse, and discrimination by employers bringing foreign visa workers to the United States."[34] DOJ reported: "This new effort improves the way the agencies share information, collaborate on cases, and train each other's investigators."[35]

That MOU expanded on a March 2010 memorandum of agreement (MOA) between USCIS and CRT on information sharing and case referral.[36] The purpose of that 2010 MOA was to establish a process for referrals between USCIS and the then-OSC regarding allegations of discrimination arising out of E-Verify by employers, as well as "information regarding the misuse, abuse, or fraudulent abuse of E-Verify."[37] That MOA, however, was not focused on protecting the rights of U.S. workers, per se, but rather related to *any* violations of section 274B of the INA, including document abuse, arising out of use of the E-Verify system.[38]

At the time the 2018 MOU was announced, then-USCIS Director Francis Cissna underscored its importance in ensuring the rights of U.S. workers and deterring fraud:

> *"Protecting and maintaining the integrity of our immigration system remains a key priority for me, and underpins the exceptional work of the professionals at USCIS. ... This agreement enhances the level of coordination among investigators who often work on the same issues at different agencies. Breaking down silos and working with our federal partners to combat employment discrimination will help ensure that U.S. workers have the advocate they need at the highest level."*[39]

I would note that USCIS itself also has separate programs to investigate and combat fraud and abuse in the H-2B[40] and H-1B visa programs, among others.[41]

Specifically, the agency provides online tip forms that are available to any American workers and visa holders themselves who believe that they have been the victims of fraud or abuse under the temporary visa programs.[42] Those tip forms also permit any individual to report asylum and refugee fraud, as well as fraud in the religious worker visa, H-2A agricultural guestworker visa, student visa, EB-5 investor visa, and other visa programs.[43]

USCIS's program for H-1B fraud is particularly robust. The agency explains:

> *The H-1B visa program should help U.S. companies recruit highly skilled aliens when there is a shortage of qualified workers in the country. Yet, too many American workers who are as qualified, willing, and deserving to work in these fields have been ignored or unfairly disadvantaged. Employers who abuse the H-1B visa program may negatively affect U.S. workers, decreasing wages and opportunities as they import more foreign workers.*
>
> *Protecting American workers by combating fraud in our employment-based immigration programs is a priority for USCIS. USCIS continuously works to deter and detect fraud in all immigration programs and we are furthering our efforts by enhancing and increasing site visits, interviews, and investigations of petitioners who use the H-1B visa program. These efforts will help assist in the prosecution of program violators and ensure that American workers are not overlooked or replaced in the process.*[44]

On July 31, 2018, CRT and DOL entered into an MOU establishing protocols to allow each "to share information, refer matters between them, and train each other's employees, with the goal of better protecting U.S. workers."[45]

As the DOJ press release about that MOU stated: "This partnership will enhance [CRT's] efforts to stop companies from discriminating against U.S. workers and assist [DOL's] Employment and Training Administration [ETA] in identifying noncompliance with its foreign labor certification process."[46] Notably, ETA's Office of Foreign Labor Certification "has statutory and regulatory authority to certify employers seeking certain employment-based visas, including H-2A and H-2B visas."[47]

That release quoted acting CRT Assistant Attorney General John Gore, who stated:

> *"Employers should hire workers based on their skills, experience, and authorization to work; not based on discriminatory preferences that violate the law. ... Our partnership with DOL, formalized today, significantly enhances the Civil Rights Division's ability to identify employers that favor temporary visa holders over U.S. workers who can do the job."*[48]

Similarly, Rosemary Lahasky, Deputy Assistant Secretary for ETA, explained:

> *"Streamlining the process for information sharing between the Department of Labor and the Department of Justice will help protect U.S. workers from unlawful discrimination . ... This partnership will help ensure U.S. workers are prioritized to fill jobs."*[49]

This MOU follows up on a separate DOL initiative, announced in April 2017, to protect American workers from discrimination resulting from the H-1B temporary skilled worker visa program.[50] As the department explained:

> *The program allows employers to hire highly skilled foreign workers in specialty occupations. The H-1B visa program authorizes the temporary employment of qualified individuals who are not otherwise authorized to work in the U.S. In recent years, some employers have used the H-1B program to hire foreign workers despite American workers being qualified and available for work or even to replace American workers.*[51]

DOL stated that as part of that initiative, it would "[r]igorously use all of its existing authority," in coordination with DHS, DOJ, and its other government partners, to investigate violators of the H-1B program, and also "[c]onsider changes to the Labor Condition Application[52] for future application cycles."[53]

The July 2018 MOU is not the first that has been entered into by CRT and an agency within DOL. On January 13, 2017, the then-OSC and the Wage & Hour Division (WHD) at DOL entered into an MOU "to facilitate information-sharing to better identify practices that violate the laws that the agencies enforce."[54]

That MOU allowed WHD to "promptly refer to OSC all written or walk-in complaints alleging discrimination and any other matters within OSC's jurisdiction," while allowing OSC to "promptly refer to WHD all written or verbal complaints alleging any matters within WHD's jurisdiction" and "promptly share information relating to suspected employer violations of the laws that WHD enforces with WHD."[55]

In addition, the MOU contained a reciprocal training requirement, "to familiarize each agency with the other's jurisdiction and to help staff recognize what may constitute immigration-related employment discrimination and violations of the laws enforced by WHD."[56]

That January 2017 MOU, however, addressed section 274B and the various laws within WHD's jurisdiction generally (including "enforcement of the labor standards protections for certain temporary nonimmigrant workers"), and did not specifically focus on protecting U.S. workers, although that is a subject that is covered therein.[57]

I would note that DOL also provides a process by which individuals can submit information about employer H-1B fraud.[58] Specifically, by filing a Form WH-4, an individual can report such alleged violations to WHD.[59]

Claims and Settlements

As noted, IER has entered into settlements with employers who, it has alleged, had discriminated against U.S. workers, either under its Protecting U.S. Workers Initiative or in one similar case, an earlier investigation.

On December 4, 2017, DOJ announced that **J.E.T. Holding Co. Inc. (JET)** had paid $40,000 to nine U.S. citizens as part of a settlement in response to claims by IER that it had "discriminated against U.S. workers" in Saipan "in favor of temporary foreign visa workers."[60]

Specifically, DOJ reported:

> *In its investigation leading up to the settlement, the department found that from approximately January to June 2016, JET, which operates a restaurant in Saipan, routinely refused to hire qualified U.S. citizens and other work-authorized individuals, including lawful permanent residents, for dishwasher positions because of their citizenship status. Instead, JET preferred to fill the positions with temporary foreign visa workers, according to the department's investigation. ... Individuals born in Saipan are U.S. citizens and its population includes work-authorized lawful permanent residents, asylees and refugees.*[61]

Those payments were made pursuant to a January 17, 2017, settlement that predated the Protecting U.S. Workers Initiative, but the matter is consistent with that initiative, and IER ostensibly considers it a precursor thereto given that initiative is referenced in the press release announcing those payments.[62]

On May 23, 2017, DOJ reported that it had reached a settlement under the Protecting U.S. Workers Initiative with an onion farm in Deming, N.M. — **Carrillo Farm Labor (Carrillo Farm)** — that resolved IER's investigation into complaints about the employer.[63] The department explained: "After investigating complaints filed on behalf of two U.S. citizens, the Justice Department determined that Carrillo Farm denied U.S. citizens employment in 2016 because it wanted to hire temporary foreign workers under the H-2A visa program."[64]

Under the terms of the settlement agreement, Carrillo Farm was required to pay unspecified civil penalties to the government, undergo training on the requirements of section 274B of the INA, and follow monitoring and reporting requirements.[65] Pursuant to a separate agreement with a legal aid provider, Carrillo Farm paid $44,000 to affected U.S. workers for lost wages.[66]

In a December 18, 2017, press release, DOJ announced that it had reached a settlement, as part of the Protecting U.S. Workers Initiative, resolving the lawsuit referenced above that it had brought against **Crop Production Services**, an agricultural company headquartered in Colorado.[67]

That lawsuit alleged that in 2016, Crop Production Services had "discriminated against at least three United States citizens by refusing to employ them as seasonal technicians at its El Campo, Texas location because the company preferred to employ temporary foreign workers under the" temporary agricultural worker, H-2A visa, program."[68] DOJ had asserted that the company "imposed more burdensome requirements on U.S. citizens than it did on H-2A visa workers to discourage U.S. citizens from working at the facility."[69]

For example, DOJ alleged in its complaint that "U.S. citizens had to complete a background check and a drug test before being permitted to start work," while "H-2A visa workers were allowed to begin working without completing them and, in some cases, never completed them."[70]

Crop Production Services agreed to pay $10,500 in civil penalties, as well as to undergo training under section 274B of the INA, and to "comply with departmental monitoring and reporting requirements."[71] The company had also agreed to pay lost wages of $18,738.75 to workers who were affected in a separate agreement reached with a private legal-aid provider.[72]

In a press release dated June 26, 2018, DOJ announced that it had reached a settlement as part of the Protecting U.S. Workers Initiative with "**Triple H Services LLC, (Triple H)**, a landscaping company based in Newland, North Carolina, that conducts business in Virginia and four other states."[73]

That agreement resolved an IER investigation "into whether Triple H discriminated against qualified and available U.S. workers based on their citizenship status by preferring to hire temporary workers with H-2B visas, in violation of the" INA.[74] According to the press release:

> *The Department's investigation found that although Triple H went through the motions of advertising over 450 landscape laborer vacancies in five states, it did so in a manner that misled U.S. workers about the available positions and prevented or deterred some from applying. The Department found that Triple H did not consider several qualified U.S. workers who applied for positions in Virginia during the recruitment period, and instead hired H-2B visa workers. In several states where jobs were available, the Department found that Triple H prematurely closed the online job application process for U.S. worker applicants, filled positions with H-2B visa workers without first advertising the jobs to U.S. workers in the relevant locations, or advertised vacancies in a manner that did not make the postings visible to job seekers using state workforce agency online services.*
>
> *The Department concluded that in taking these actions, Triple H effectively denied U.S. workers access to jobs based on its preference for hiring temporary H-2B visa workers to fill the positions.*[75]

Pursuant to that settlement, Triple H agreed to set up a back-pay fund, capped at $85,000, to compensate those who were affected; pay civil penalties in the amount of $15,600; "engage in enhanced recruitment activities to attract U.S. workers"; and subject itself to monitoring by DOJ for three years."[76]

DOJ announced on September 18, 2018, that it had reached a fourth settlement under the Protecting U.S. Workers Initiative, this time with "**Palmetto Beach Hospitality LLC (Palmetto)**, a company that provides housekeeping services to hotels in the Myrtle Beach, South Carolina area", resolving an IER investigation.[77]

The department's press release stated that this:

> *[I]nvestigation determined that Palmetto failed to consider applications from qualified U.S. workers for its housekeeper positions, even though employers are required to recruit and hire available and qualified U.S. workers before they receive permission to hire temporary foreign workers under the H-2B visa program. After ignoring applications from U.S. workers, Palmetto represented to the U.S. Department of Labor (DOL) that it could not find qualified U.S. workers and obtained authorization to employ temporary visa workers.*[78]

Under that settlement, Palmetto was required to "set aside $35,000 to pay any wages lost by U.S. workers whose applications it improperly rejected or ignored, pay $42,000 in civil penalties to the United States, and be subject to departmental monitoring."[79] Significantly, it also agreed to "engage in several types of enhanced recruiting and job advertising efforts to attract qualified U.S. workers, far beyond those required by the H-2B visa rules."[80]

On February 25, 2019, DOJ announced that it had reached a settlement with "**CFA Institute (CFAI)**, an international association of investment professionals, headquartered in Charlottesville, Virginia," under the Protecting U.S. Workers Initiative.[81]

That case presented some unique facts:

> *CFAI offers a global certification for Chartered Financial Analysts who pass an exam that CFAI administers annually. The settlement resolves the Department's investigation into whether CFAI violated the anti-discrimination provision of the Immigration and Nationality Act (INA) by preferring to hire H-1B visa holders over U.S. workers when it selected CFAI exam graders from its members.*[82]

DOJ explained that IER's "independent investigation concluded that from at least November 2016 through January 2018, CFAI set aside annual exam-grading positions for its members who required or had H-1B visas or other high-skill temporary visas, based on their citizenship status."[83] The department concluded that, in so doing, "CFAI failed to consider equally qualified U.S. workers for such positions."[84]

CFAI agreed to pay civil penalties in the amount of $321,000 as part of that settlement, to train its employees on the requirements of section 274B of the INA, and to subject itself to DOJ "monitoring and reporting requirements".[85]

In another Protecting U.S. Workers Initiative Case, on May 29, 2019, DOJ announced that it had reached a settlement with **El Expreso Bus Company (El Expreso**), an intercity passenger bus service company that is headquartered in Houston, Texas.[86] That settlement resolved IER's investigation in which it had determined:

> *El Expreso failed to consider applications from qualified U.S. workers for its temporary bus driver positions and then petitioned for H-2B visa workers to fill the positions, even though the H-2B visa program requires employers to recruit and hire available and qualified U.S. workers before they receive permission to hire temporary foreign workers.*[87]

Pursuant to that settlement, El Expreso was required to pay $31,500 in civil penalties to the government, "set aside $197,500 to pay any wages lost by U.S. workers whose applications it improperly rejected or ignored", and "engage in enhanced recruiting and job advertising efforts to attract qualified U.S. workers before using temporary visa programs." By March 3, 2020, El Expreso had paid more than $90,000 to eight U.S. workers as part of that settlement.[88]

In a press release dated June 11, 2019, DOJ reported that that it had reached a settlement agreement with **Sam Williamson Farms (SWF)** under the Protecting U.S. Workers Initiative.[89]

In that case:

> *The Department of Justice's independent investigation concluded that at the end of the 2016-2017 strawberry picking season, SWF informed its existing U.S. workers that it would rely instead on H-2A workers from a farm labor contractor to harvest its strawberries for the next season, and retained a farm labor contractor for the express purpose of obtaining workers with H-2A visas. Ultimately, the strawberry picking positions were filled by more than 300 H-2A workers and no U.S. workers.*[90]

SWF agreed to pay up to $85,000 in back pay to U.S. workers who were eligible, as well as $60,000 in civil money penalties.[91] In addition, SWF was required to "conduct enhanced U.S. worker recruitment and advertising for future positions," as well as to train its employees on the requirements of the anti-discrimination provisions in section 274B of the INA and to subject itself to monitoring and reporting requirements imposed by DOJ.[92]

In the most recent case under the Protecting U.S. Workers Initiative, on March 19, 2020, DOJ announced a settlement that resolved IER's claims against **Hallaton Inc.**, a Baltimore County, Md., construction firm that installs geosynthetic liners.[93]

The department's press release explained that IER's:

> *[I]nvestigation determined that from at least Dec. 1, 2017, until at least June 1, 2018, Hallaton routinely discriminated against U.S. workers by failing to consider them for construction laborer positions. Despite receiving over two dozen applications from available and qualified U.S. workers through the Maryland Workforce Exchange, Hallaton hired none of them. The company then sought and received permission to hire 63 H-2B visa workers for these jobs by claiming that it could not find qualified and available U.S. workers.*[94]

That settlement requires Hallaton to pay up to $80,000 in back pay to U.S. workers who were affected by its actions, as well as $43,143 in civil penalties to the government.[95] In addition, that firm, which is now subject to DOJ "monitoring and reporting requirements", is required to enhance its recruitment of U.S. workers and its advertising for positions in the future, and to train its employees on the requirements of section 274B of the INA."[96]

Conclusion

In EO 13788, "Buy American and Hire American", President Trump directed the Departments of Justice, State, Labor, and Homeland Security to "issue new guidance ... to protect the interests of United States workers in the administration of our immigration system, including through the prevention of fraud or abuse."

Those departments have taken that admonition seriously, as perhaps best exemplified by IER's Protecting U.S. Workers Initiative. Under this initiative, IER has investigated and taken action against employers who have violated the INA, and in particular the anti-discrimination provisions in section 274B, by allegedly abusing temporary guestworker visa programs, thereby denying U.S. workers desperately needed job opportunities.

Critically, IER is (to paraphrase former USCIS Director Cissna) "[b]reaking down silos and working with" its "federal partners to combat employment discrimination" in order to "help ensure that U.S. workers have the advocate they need at the highest level."

At a time in American history when much of the economy is stalled, and jobs are harder to come by than in years, each of those entities efforts should be applauded.

U.S. workers who believe they have been discriminated against in the workplace as a result of temporary visa fraud or abuse should call IER's worker hotline at 1-800-255-7688. Employers who are aware that other businesses are abusing the temporary visa system to the detriment of American workers should call IER's employer hotline at 1-800-255-8155.

In addition, U.S. workers who are aware of an employer's fraud or abuse of one or more of those temporary visa programs, or anyone who is aware of any kind of suspected immigration benefit fraud can contact USCIS using its tip form.

Finally, anyone with information that an employer of H-1B nonimmigrants has committed a violation of the provisions of that program can file a Form WH-4 with the Wage and Hour Division at DOL. Instructions can he found here.

In the words of former Attorney General Sessions: "Where there is a job available, U.S. workers should have a chance at it before we bring in workers from abroad." Now more than ever.

End Notes

[1] Andrew Arthur, "DOJ Drops the Hammer on Employers Who Discriminate Against U.S. Workers: If employers are cheating, call the Protecting U.S. Workers Initiative — tell them Art sent you", Center for Immigration Studies blog, March 23, 2020.

[2] "Immigrant and Employee Rights Section", U.S. Department of Justice, undated.

[3] "Civil Rights Division", U.S. Department of Justice, undated.

[4] See Final Rule: "Standards and Procedures for the Enforcement of the Immigration and Nationality Act", final rule, 81 Federal Register 91768-69, December 19, 2016.

[5] Section 102(c) of the Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3375 (November 6, 1986).

[6] "Proposals to Reform United States Immigration Policy", Hearing before the Senate Committee on the Judiciary, statement of Attorney General Janet Reno (103d Congress, June 15, 1994).

[7] See Final Rule: "Standards and Procedures for the Enforcement of the Immigration and Nationality Act", final rule, 81 Federal Register 91768-69, December 19, 2016.

[8] Section 274B of the Immigration and Nationality Act.

[9] Section 102(a) of the Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3375 (November 6, 1986).

[10] Section 535 of the Immigration Act of 1990, Pub. L. 101-649 (November 11, 1990).

[11] Section 102(a) of the Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3375 (November 6, 1986).

[12] *Ibid.*

[13] Section 274B(a)(4) of the Immigration and Nationality Act.

[14] Section 274B(a)(2)(A) of the of the Immigration and Nationality Act.

[15] See 8 U.S.C. § 1546:

> *Whoever knowingly makes under oath, or as permitted under penalty of perjury under section 1746 of title 28, United States Code, knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document which contains any such false statement or which fails to contain any reasonable basis in law or fact ... Shall be fined under this title or imprisoned not more than 25 years (if the offense was committed to facilitate an act of international terrorism (as defined in section 2331 of this title)), 20 years (if the offense was committed to facilitate a drug trafficking crime (as defined in section 929(a) of this title)), 10 years (in the case of the first or second such offense, if the offense was not committed to facilitate such an act of international terrorism or a drug trafficking crime), or 15 years (in the case of any other offense), or both.*

18 U.S.C. § 1001(a):

> *Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—*
>
> *(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;*

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years.

[16] Section 535 of the Immigration Act of 1990, Pub. L. 101-649 (November 11, 1990).

[17] Section 274A(b) of the Immigration and Nationality Act.

[18] Section 535 of the Immigration Act of 1990, Pub. L. 101-649 (November 11, 1990).

[19] Andrew Arthur, "DOJ Drops the Hammer on Employers Who Discriminate Against U.S. Workers: If employers are cheating, call the Protecting U.S. Workers Initiative — tell them Art sent you", Center for Immigration Studies blog, March 23, 2020.

[20] Executive Order No. 13788, 82 Federal Register 18837 (April 18, 2017).

[21] *Ibid.* at §2(b).

[22] Section 212(a)(5)(A)(i) of the Immigration and Nationality Act.

[23] Preston Huennekens and Bryan Griffith, "Maps: Impact of H-2B Guest Workers in 2017", Center for Immigration Studies, April 2, 2018.

[24] Executive Order No. 13788, 82 Federal Register 18837 (April 18, 2017).

[25] "FY 2020 Performance Budget", U.S. Department of Justice, Civil Rights Division, at 10, undated.

[26] *Ibid.*

[27] "Justice Department Files Lawsuit Against Crop Production Services Alleging Discrimination Against U.S. Workers", Department of Justice, Office of Public Affairs press release, September 28, 2017.

[28] "Justice Department Settles Claim Against Maryland Construction Firm for Discriminating Against U.S. Workers", Department of Justice, Office of Public Affairs press release, March 19, 2020.

[29] "Justice Department Files Lawsuit Against Crop Production Services Alleging Discrimination Against U.S. Workers", Department of Justice, Office of Public Affairs press release, September 28, 2017.

[30] "Departments of Justice and State Partner to Protect U.S. Workers from Discrimination and Combat Fraud", Department of Justice, Office of Public Affairs press release, October 11, 2017.

[31] "About Us – Bureau of Consular Affairs", U.S. Department of State, undated.

[32] "Bureau of Consular Affairs", usa.gov, undated.

[33] "Departments of Justice and State Partner to Protect U.S. Workers from Discrimination and Combat Fraud", Department of Justice, Office of Public Affairs press release, October 11, 2017.

[34] "The Justice Department and USCIS Formalize Partnership to Protect U.S. Workers From Discrimination and Combat Fraud", Department of Justice, Office of Public Affairs press release, updated May 11, 2018.

[35] *Ibid.*

[36] "Memorandum of Agreement Between U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security, and Civil Rights Division, U.S. Department of Justice", March 17, 2010.

[37] *Ibid.,* at 3.

[38] See *Ibid.*

[39] "The Justice Department and USCIS Formalize Partnership to Protect U.S. Workers From Discrimination and Combat Fraud", Department of Justice, Office of Public Affairs press release, updated May 11, 2018.

[40] "Combating Fraud and Abuse in the H-2B Visa Program", U.S. Citizenship and Immigration Services, updated March 13, 2020.

[41] "Combating Fraud and Abuse in the H-1B Visa Program", U.S. Citizenship and Immigration Services, updated March 13, 2020.

[42] "USCIS Tip Form", U.S. Citizenship and Immigration Services, undated.

[43] *Ibid.*

[44] "Combating Fraud and Abuse in the H-1B Visa Program", U.S. Citizenship and Immigration Services, updated March 13, 2020.

[45] "Departments of Justice and Labor Formalize New Partnership to Protect U.S. Workers From Discrimination and Combat Visa Abuse", Department of Justice, Office of Public Affairs press release, July 31, 2018.

[46] *Ibid.*

[47] *Ibid.*

[48] *Ibid.*

[49] *Ibid.*

[50] "US Department of Labor Announces Plans to Protect American Workers from H-1B Program Discrimination", Department of Labor news release, April 4, 2017.

[51] *Ibid.*

[52] See "Labor Condition Application", Department of Labor, undated.

> *Labor condition application (LCA), Form ETA 9035/9035E is a document that a prospective H-1B employer files with ETA when it seeks to employ nonimmigrant workers at a specific job occupation in an area of intended employment for not more than three years. In this document, the employer attests to standards to which it will adhere. It must be certified by the authorized DOL official pursuant to the provisions of 20 C.F.R. §655.740 before it can be used.*

[53] *Ibid.*

[54] "Memorandum of Understanding Between Office of Special Counsel for Unfair Immigration-Related Employment Practices, Civil Rights Division, U.S. Department of Justice and Wage & Hour Division", U.S. Department of Labor Regarding Information Sharing and Case Referral. January 13, 2017.

[55] *Ibid.*

[56] *Ibid.*

[57] See *Ibid.* at 2. "Citizenship status discrimination: when individuals are rejected for employment, treated adversely in the hiring process, or fired because of their real or perceived citizenship or immigration status, or because of their type of work authorization. U.S. citizens, temporary residents, recent lawful permanent residents, asylees, and refugees are protected from citizenship status discrimination."

[58] "Instructions for Form WH-4: H-1B Nonimmigrant Information", Department of Labor, undated.

[59] *Ibid.*

[60] "Saipan Restaurant Distributes $40,000 in Back Pay to U.S. Workers Under Justice Department Settlement", Department of Justice, Office of Public Affairs press release, December 4, 2017.

[61] *Ibid.*

[62] *Ibid.*

[63] "Justice Department Settles U.S. Worker Discrimination Claims Against New Mexico Farm", Department of Justice, Office of Public Affairs press release, May 23, 2017.

[64] *Ibid.*

[65] *Ibid.*

[66] *Ibid.*

[67] "Justice Department Settles U.S. Worker Discrimination Claims Against Colorado Agricultural Company", Department of Justice, Office of Public Affairs press release, December 18, 2017.

[68] *Ibid.*

[69] *Ibid.*

[70] *Ibid.*

[71] *Ibid.*

[72] *Ibid.*

[73] "Justice Department Settles Claims Against Landscaping Company for Discriminating Against U.S. Workers", Department of Justice, Office of Public Affairs press release, June 26, 2018.

[74] *Ibid.*

[75] *Ibid.*

[76] *Ibid.*

[77] "Justice Department Announces Fourth Settlement Protecting U.S. Workers From Discrimination", Department of Justice, Office of Public Affairs press release, September 18, 2018.

[78] *Ibid.*

[79] *Ibid.*

[80] *Ibid.*

[81] "Justice Department Settles Claims Against International Financial Association for Discriminating Against U.S. Workers", Department of Justice, Office of Public Affairs press release, February 25, 2019.

[82] *Ibid.*

[83] *Ibid.*

[84] *Ibid.*

[85] *Ibid.*

[86] "Justice Department Announces Sixth Settlement Under the Civil Rights Division's Protecting U.S. Workers Initiative", Department of Justice, Office of Public Affairs press release, May 29, 2019.

[87] *Ibid.*

[88] "Houston Bus Company Distributes More Than $90,000 to U.S. Workers Under Department of Justice Settlement", Department of Justice, Office of Public Affairs press release, March 3, 2020.

[89] "Justice Department Settles Claim Against Florida Strawberry Farm for Discriminating Against U.S. Workers", Department of Justice, Office of Public Affairs press release, June 11, 2019.

[90] *Ibid.*

[91] *Ibid.*

[92] *Ibid.*

[93] "Justice Department Settles Claim Against Maryland Construction Firm for Discriminating Against U.S. Workers", Department of Justice, Office of Public Affairs press release, March 19, 2020.

[94] *Ibid.*

[95] *Ibid.*

[96] *Ibid.*