

Introduction

Labor advocates claim that the H-2B program is in urgent need of major reform. They the reforms are needed to “prevent discrimination, elevate labor standards, respond to real labor market needs, end captive employment, respects family unity, ensure access to justice and afford migrant workers an accessible pathway to citizenship”.

In order to remedy these alleged injustices, labor advocates have drafted and are shopping The Seasonal Worker Solidarity Act to sympathetic Members of Congress.

The Seasonal Worker Solidarity Act attempts to address problems that do not exist. Most of the provisions of the act are in the current regulations. The Wild West days of the H-2B program are gone. The 2008, 2013 and 2015 regulations have substantially raised the wage rate H-2B employers must pay and have increased worker protections. There are bad apples in every program but the enforcement mechanisms are in place to catch the bad actors.

Allegations

Claim: H-2B employers intentionally bypass available U.S. workers

An H-2B labor certification is contingent on employers canvassing the local labor market and preferentially hiring qualified American workers. The U.S. Department of Labor (DOL) only issues an approved H-2B labor certification if the employer demonstrates that there are not enough willing, qualified, and able U.S. workers are available for the job.

This labor market test is not a mere formality. Regulations require employers to advertise the job in local newspapers and post the job opportunity on state and national job banks. Many seasonal employers go above and beyond these requirements, advertising the job through private sector job banks, local radio, and trade journals. Employers only hire H-2B workers if these recruitment efforts are unsuccessful. H-2B is not a matter of convenience; it's a last resort.

Claim: Employers underpay H-2B workers and undercut local workers and competitors

H-2B wage rates average \$13.58/hour across all job classifications and geographic locations, a 40% increase since 2008. In major H-2B markets, the wage rate exceeds \$15 per hour. Because of the legal requirements to pay the same wage rates to American workers, the H-2B program actually drives up wages in these industries. H-2B program participation does not disadvantage U.S. workers; it ensures a higher wage rate than would they would otherwise earn.

Claim: Labor recruiters mislead H-2B workers and charge high fees to secure positions

This issue was addressed in the 2015 regulations. Employers are now required to reimburse workers for all recruitment fees (food, lodging, fees to recruiter, transportation, tolls) within first week of arrival. A foreign labor recruiter registry was also created in order for USCIS and DOL to have stronger oversight over foreign labor recruiters.

During the visa interview process, the State Department is required to ask H-2B applicants to disclose any recruitment abuse and/or if they were required to pay a fee to secure the interview. This is illegal.

All advertising, offer letters, and terms and conditions of employment address reimbursement of all recruiting expenses.

Claim: H-2B visas tie workers to a single employer who controls their fate

Workers are not bound to one employer. They are free to switch employers the next year. They also may leave the employer at any time to return home.

Claim: H-2B program denies workers the opportunity to settle with their families, even after years of vital contributions

A vast majority of H-2B workers do not want to become citizens. They want to come to the United States to work then return to their home country where their families reside. The H-2B program allows them to provide for their immediate and extended families. It is a win win for the American owned small businesses and for the foreign workers.

Claim: Employers retaliate in ways that lead to deportation and prevent future hiring

Employers are already required to post the workers' rights on the job site. H-2B workers are also eligible to be represented by federally funded legal services.

Claim: Employers rarely face consequences for violating regulations and workers' rights

The Wage and Hour Division of DOL and the Fraud and National Security Division (FNSD) of USCIS are tasked with oversight of the H-2B program. FNSD conducted a high number of on-site audits last Fall and Wage and Hour routinely audits H-2B employers. There have been several high profile convictions of H-2B employers over the last several year. The recently announced case against horse trainer Chad Brown is an example.

Claim: Employers discriminate by recruiting workers of specific countries, ages and genders, among other factors

Employers are doing their best to run successful businesses in highly competitive industries. It is not their job to serve as de facto social welfare agencies.

Claim: Visa issuance is random and high volume employers get a large share of visas

Visa allocation is random. Employers who request a greater number of visas do not receive preferential treatment. An employer who requests five workers stands just as good of a chance as an employer who requests 250 workers. Brightview is the largest user of the H-2B program. The last two years they have fared poorly in terms of how many of their petitions have been approved by USCIS. This proves that larger employers do not receive preferential treatment.

Claim: Employers use the H-2B program to make work more precarious

A nine month need qualifies as seasonal. For example, in the southeast grass does not grow from December through February. Southeastern landscapers have a true seasonal need but an arbitrary seven month restriction would prevent these businesses from servicing their contracts, expanding etc.

A seven month restriction would also harm the H-2B workers. The H-2B workers rely on nine months of wages to provide for their families in their home countries.

Conclusion

The H-2B program is one of the most highly regulated and overseen visa programs that the federal government administers. What other visa program requires employers to hire all willing and qualified American workers first? What other visa program provides the workers with numerous avenues and resources to report abuse and program violations?

The H-2B program should be a model program for all other visa programs. We urge unions to work with us to increase the awareness of H-2B jobs to American workers. Goodness knows that these employers are desperate for more workers!