

As the H-2B visa program grows, the need for reforms that protect workers is greater than ever

Employers stole \$1.8 billion from workers in the industries that employed most H-2B workers over the past two decades

Report • By [Daniel Costa](#) • August 18, 2022

What this report finds: The H-2B program—which allows U.S. employers to hire migrant workers for temporary and seasonal jobs—is growing and will reach its largest size ever in 2022. At the same time, mass violations of wage and hour laws are being committed in the industries that employ H-2B workers. Department of Labor data show that nearly \$1.8 billion was stolen from workers employed in the main H-2B industries (which includes both U.S. and migrant workers) between 2000 and 2021.

Why it matters: The Biden administration has been increasing the size of the H-2B program while H-2B workers are in a vulnerable situation. Their precarious immigration status makes it difficult for them to complain when their employers break the law. This report is timely because the Biden administration is currently considering new changes to the H-2B program.

What can be done about it: The Biden administration can issue new regulations that protect H-2B workers and that screen out and prohibit employers from hiring through H-2B if they have a track record of violating wage and hour and labor laws.

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The administration can also issue new rules to protect workers from employer retaliation and can issue better wage rules.

Executive summary

The H-2B visa program is one of many U.S. temporary work visa programs. H-2B is intended to be used when employers face labor shortages in seasonal jobs, with the most common occupations including landscaping, construction, forestry, seafood and meat processing, traveling carnivals, restaurants, and hospitality. H-2B has an annual numerical limit or “cap” of 66,000 that is established by law but that has been supplemented with additional visas by Congress and the executive branch on a year-by-year basis over the past few years. The number of H-2B workers is growing and in 2022 will surpass the peak it had reached in 2007.

*Data from United States Citizenship and Immigration Services show that there were nearly **117,000 H-2B workers in 2021**, and the program is projected to grow to **more than 150,000 workers in 2022**, a new high.*

Why does that matter? Because as this growth occurs, migrant workers with H-2B visas are being employed in industries in which there is extensive wage theft and lawbreaking by employers.

*Data from the U.S. Department of Labor’s Wage and Hour Division (WHD) show that, in the seven major industries in which nearly all H-2B workers are employed, nearly **\$1.8 billion in wages** was stolen from workers (which includes both U.S. and migrant workers) between 2000 and 2021.*

During the period from 2000 to 2021, 225,227 cases were investigated by WHD in the seven major H-2B industries, and violations were found in 180,451, or 80%, of those cases.

*That means that whenever WHD investigates an employer in one of these seven major H-2B industries, there is an **80% chance**—a very high likelihood—that WHD will find one or more violations.*

When violations are found, WHD sometimes assesses Civil Money Penalties (CMPs) in addition to requiring employers to pay workers the wages owed. CMPs are punitive measures, intended to deter future violations, and are more likely to be imposed when a particularly egregious violation has occurred. The total amount of Civil Money Penalties (CMPs) assessed from 2000 to 2021 was nearly \$115 million. The largest share, \$65 million

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(representing more than half of the total penalties), was assessed in food services, followed by construction (\$21.5 million, or nearly 18%).

H-2B workers are being recruited into industries where they will be vulnerable, but no new measures have been implemented yet by the Biden administration to better protect them. President Biden should push for and implement major structural reforms of the H-2B visa program. The president can direct the Department of Homeland Security and the Department of Labor to make reforms including, at a minimum:

- a registration system to screen and prohibit employers with a record of labor and wage and hour violations from hiring through H-2B;
- new regulations on wages and worker protections; and
- an affirmative process for deferred action and work authorization for all workers with temporary visas and undocumented workers who are involved in labor disputes with employers.

Introduction

H-2B is one of many U.S. temporary work visa programs.¹ The Immigration and Nationality Act of 1952 created some of the existing temporary work visas, including the H-2 visas for foreign nationals “coming temporarily to the United States to perform other temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country.”² In 1986, the Immigration Reform and Control Act (IRCA) split the H-2 visa into two separate visas, the H-2A for temporary workers employed in agricultural occupations and H-2B for temporary workers in occupations outside of agriculture.³

More specifically, the H-2B program is intended to be used when nonagricultural employers face labor shortages in seasonal jobs. In practice, the most common H-2B occupations are in landscaping, construction, forestry, seafood and meat processing, traveling carnivals, restaurants, and hospitality. Legislation enacted subsequent to IRCA, the Immigration Act of 1990, established an annual numerical limit of H-2B visas that could be issued, of 66,000 visas, to take effect in fiscal year 1992.⁴ This annual numerical limit of 66,000 visas is often referred to as the H-2B annual “cap.”

The H-2B visa program as presently constructed is deeply flawed. Like other temporary work visa programs, H-2B is rife with abuse and in desperate need of reform. It fails both to ensure that migrant workers are paid fairly and treated with dignity and to prevent harm to the domestic workforce. Problematically, the current structure does not prevent employers with track records of labor and wage and hour violations from hiring through the H-2B program. In addition, current rules make it easy for employers to game the system to bypass available U.S. workers who may be seeking seasonal jobs. The families of H-2B workers in practice are not able to join workers in the United States, and H-2B workers have no path to permanent residence and U.S. citizenship. Together, these flaws call into question the credibility of the program.

This is relevant today because employer demand for more H-2B visas continues to escalate and the Biden administration has repeatedly used authority ceded by Congress to increase the size of the H-2B program. Meanwhile, the administration has not yet taken any actions to implement much-needed reforms that would protect migrant workers and U.S. workers.

In January 2022, DHS announced an increase of 20,000 visas above the annual numerical limit or cap of 66,000 visas set by Congress,⁵ to be issued during the first half of fiscal year 2022. These additional visas above the cap set by Congress are generally referred to as “supplemental” visas. On March 31, the Department of Homeland Security (DHS) announced it would increase the size of the H-2B visa program for fiscal year 2022 by another 35,000 visas,⁶ which would be allotted for the second half of the fiscal year, thereby setting the total H-2B cap for 2021 at 121,000. On May 18, DHS and the Employment and Training Administration (in the U.S. Department of Labor [DOL]) issued a temporary regulation formalizing the issuance of the 35,000 supplemental visas, along with other provisions affording H-2B workers a limited flexibility to change employers while in the United States.⁷ As this report shows and explains, the actual total number of H-2B workers in 2022 will in fact be significantly higher than 121,000 because of visa extensions and exemptions from the cap.

While the United States needs pathways that allow more migrants to come to the United States and work, the H-2B program is not a model for a fair and safe pathway because of its flaws, as numerous reports, investigations, and government audits have proved. As this report discusses, the available data on labor standards enforcement show that employers have engaged in mass lawbreaking by stealing nearly \$2 billion in wages from workers in major H-2B industries over the past two decades.

In light of these abuses taking place in those industries, the Biden administration’s decision to expand a flawed work visa program that channels vulnerable workers into those same industries—rather than using the legal authority it has to improve the program so that both migrant and U.S. workers are adequately protected—is misguided. Rather than expand H-2B, the Biden administration should implement reforms that would protect all workers in H-2B industries, where wage theft is all too common.

This report explains how the recent growth in the H-2B program has come about and provides the top line numbers on wage theft in the industries that employ most H-2B workers. The data and analysis presented here point to the urgent need for the Biden administration to promulgate regulations that protect these workers. These regulations should include rules and a process to prohibit employers that violate wage and hour or labor laws from hiring through the H-2B program, something that has not previously been considered. In addition, the Biden administration should support recently introduced legislation that would bring lasting reforms to the H-2B program, including protections from retaliation and a path to citizenship for H-2B workers. (All of these reforms are discussed later in the report.)

Background on the H-2B visa program, appropriations legislation and H-2B riders, and the annual cap

As noted in the introduction, the H-2B program has an annual numerical limit that was set in law by Congress in 1990 at 66,000. However, some H-2B jobs are exempt from being counted against the cap. The categories of H-2B workers exempt from the cap, as described by the Congressional Research Service (CRS), include:

- *current H-2B workers seeking an extension of stay, change of employer, or change in the terms of employment;*
- *H-2B workers previously counted toward the cap in the same fiscal year;*
- *fish roe processors, fish roe technicians, and/or supervisors of fish roe processing; and*
- *H-2B workers performing labor in the U.S. territories of the Commonwealth of the Northern Mariana Islands (CNMI) and/or Guam until December 31, 2029.*⁸

In fiscal year 2016, Congress authorized a “returning worker” exemption, through appropriations legislation to fund the operation of the U.S. government. The legislation included language (known as a “rider”) exempting H-2B workers from the cap in fiscal year 2016 if they were previously in H-2B status in any of the preceding three fiscal years. There was no cap on the number of returning H-2B workers under the exemption.⁹

In addition, in each year since fiscal year 2017, Congress has, through appropriations riders, given the executive branch the discretionary legal authority to roughly double the number of H-2B visas available. The Democrats and Republicans in the congressional appropriations committees who included and supported the language to expand H-2B failed to specify the level of increase they wanted for the H-2B program—passing the buck instead to the executive branch, by directing DHS, in consultation with DOL, to determine how many additional H-2B visas are appropriate, if any. DHS has interpreted the statute as allowing DHS to issue up to 64,716 supplemental visas in the corresponding fiscal year.¹⁰

In total, it has been seven years since Congress first permitted increases to the size of the H-2B program through an appropriations rider, and similar rider language has been included in draft appropriations legislation for fiscal year 2023.¹¹

Some of the regulations issuing supplemental visas made available through appropriations riders after fiscal year 2016 have required that the H-2B workers who are issued supplemental visas be “returning” H-2B workers, meaning that they were previously in H-2B status in any of the preceding three fiscal years. Some of the supplemental H-2B visas have also been reserved for nationals of specific countries. For example, for the 20,000 supplemental visas made available for the first half of fiscal year 2022, 13,500 of them were “limited to returning workers, regardless of country of nationality,” while 6,500

were “reserved for nationals of El Salvador, Guatemala, and Honduras (Northern Triangle countries) and Haiti...(regardless of whether such nationals are returning workers).”¹² A similar provision was included in the regulation making supplemental visas available for the second half of fiscal year 2022: 23,500 visas were “limited to returning workers, regardless of country of nationality,” and 11,500 were “reserved for nationals of El Salvador, Guatemala, and Honduras (Northern Central American countries) and Haiti as attested by the petitioner (regardless of whether such nationals are returning workers).”¹³

A number of other changes to the H-2B program that are harmful to workers have been made through appropriations riders since 2015, including riders to prevent DOL from enforcing key H-2B regulations that protect workers.¹⁴ For example, one rider prohibited DOL from enforcing rules against worker discrimination in the H-2B program (known as the rule on corresponding employment). Another rider prohibited DOL from enforcing the rule requiring employers to offer and provide employment to H-2B workers for a total number of work hours equal to at least three-fourths of the workdays promised on their job contracts (known as the three-fourths guarantee). Additional riders prohibited DOL from conducting audits and oversight of employers to ensure they conducted the required recruitment of U.S. workers. While these regulations still technically remain in effect, the riders prohibit DOL from using any funds to enforce them.

Another rider, one on employer-provided wage surveys, permitted H-2B employers to submit alternative wage surveys that were not conducted by DOL to DOL for consideration on where to set wage rates for their H-2B employees, even in cases where DOL has appropriate survey data for the occupation and region. The impact of using employer-provided surveys is that employers are allowed to pay their H-2B workers a lower wage than what would otherwise be required according to DOL data¹⁵—often \$3 to \$5 less per hour than required by DOL data—leading worker advocates to challenge the practice.¹⁶ The Obama administration’s 2015 H-2B wage methodology regulation attempted to curb the use of employer-provided wage surveys by placing restrictions on their use,¹⁷ but the rider effectively overrules the 2015 regulation.

Together these riders have allowed employers to undercut labor standards, treat their H-2B workers unfairly, and underpay them with impunity. As of fiscal year 2022, the riders on preventing DOL enforcement of the corresponding employment and three-fourths guarantee rules are still in effect (i.e., these have been attached to appropriations bills each year since they were introduced), as well as the rider permitting the broad use of employer-provided wage surveys to set H-2B wage rates.

This is not an ideal way to make immigration policy. The *New York Times* editorial board has drawn attention to this dysfunction and called for a “stop [to] the riders that are derailing H-2B reform.”¹⁸ Leaders in Congress have issued bipartisan statements arguing that the budget riders usurp the authority of the relevant committees of jurisdiction in Congress.¹⁹ Nevertheless, members of Congress have buckled to industry pressure and included harmful rider language in successive years.

President Biden’s administration has continued the annual tradition of expanding H-2B and has gone even further than President Trump. The administration has used the

authority given to it by Congress to increase the number of H-2B visas by 55,000 in fiscal year 2022—the largest number of supplemental H-2B visas ever issued in a single year.²⁰

New data allow better estimates on true size of the H-2B program

While the annual cap for the H-2B program has been set in law at 66,000 since 1992, in recent years the number of H-2B workers has been much higher, due mostly to congressionally authorized increases every year, as noted in the previous section, along with extensions and exemptions from the cap.

The first change to the H-2B cap occurred during fiscal years 2005–2007, when Congress passed a law putting in place a temporary “returning worker exemption” during those years that allowed migrant workers who had been employed with an H-2B visa in any one of the previous three fiscal years to not be counted against the annual cap. As a result, the H-2B program reached what has been considered its high point in fiscal year 2007. In that year, 129,547 H-2B visas were issued by the State Department.²¹ In addition, USCIS’s *Characteristics of H-2B Nonagricultural Temporary Workers* report for fiscal year 2007 shows that 2,218 petitions for change of status to H-2B were approved by USCIS, and 3,294 Canadian nationals and one Bahamian national were admitted into H-2B status by Customs and Border Protection. This brings the total number of new H-2B workers in 2007 to 135,060.²²

It should be noted that the actual number of H-2B workers was likely even higher in 2007, assuming some additional number of H-2B workers extended their status with the same employer. However, data on visa extensions are not publicly available for 2007 so that cannot be verified.

As of 2021, however, data on H-2B extensions—dating back to 2015—are now available through the United States Citizenship and Immigration Services (USCIS) H-2B Employer Data Hub. These new data—combined with existing data (as described above) on State-issued visas, change-of-status approvals, and Canadian nationals and others who are not required to have a visa—provide new insights into the true size of the H-2B program and allow us to document the growth of the H-2B program since the returning worker and supplemental H-2B visas began to be added in fiscal year 2016.

A note about H-2B data and the application process

The initial stages of the H-2B application process are: First, an employer must submit an application for a labor certification to the U.S. Department of Labor (DOL), describing the positions they wish to hire H-2B workers for, along with other requirements. Data on H-2B labor certifications are available from DOL’s

Office of Foreign Labor Certification and list data on employers seeking H-2B workers, including the names and addresses of employers, the detailed job occupations they seek workers for, where the jobs will be located, the number of H-2B workers employers wish to hire, and the wage rates they promise to offer H-2B workers.

Once the labor certification has been approved by DOL, the employer can then submit a petition to U.S. Citizenship and Immigration Services (USCIS), which is a subagency of the U.S. Department of Homeland Security. That petition is known as Form I-129, which seeks approval for an H-2B worker or workers who will fill a position or positions. The USCIS H-2B Employer Data Hub, created in 2021, provides data on individual H-2B employers, listing key information about H-2B petitions that USCIS has adjudicated, including how many petitions for H-2B workers were approved or denied, and whether each approval was counted under the original annual cap of 66,000 or the supplemental cap for the corresponding fiscal year, or whether the H-2B job was exempt from the caps. The available data on approvals may include H-2B workers changing jobs or changing the terms of employment in their current position, but the USCIS data are not detailed enough to discern when an approval is for one of these reasons; the data specify only whether an H-2B job is for initial (i.e., new) employment or continuing employment (i.e., an extension of H-2B status, or what is commonly referred to as a visa extension), and which cap the job was counted under, if any.

As with the H-2B labor certification data from DOL, data are also provided in the H-2B Employer Data Hub regarding the names and addresses of petitioning employers, the worksite states for H-2B jobs, as well as the occupations and industries of the jobs listed in the H-2B petitions and the wage range for each job.

USCIS also publishes annual reports that it submits to Congress on the H-2B program, which are titled *Characteristics of H-2B Nonagricultural Temporary Workers*. Those reports include aggregate data on the number of H-2B approvals by USCIS, which include new H-2B workers who were not issued visas because they were either already inside the United States or did not require a visa (the latter applies only to certain Canadian and Bermudian citizens, Bahamian nationals, and British subjects resident in certain islands). However, the USCIS reports do not publish data on the number of H-2B approvals for continuing employment; for that information, we must rely on the microdata published in the H-2B Employer Data Hub.

If a prospective migrant employee is not already located in the United States after USCIS approves a petition for employment in H-2B status, then the employer must apply to the U.S. State Department for a visa allowing the worker to travel to the United States, and the prospective worker must go to the local

consulate or embassy in the country of origin for an in-person interview before being issued a visa (unless they are eligible for a waiver of this requirement, as was available for many H-2B applicants during the pandemic). The State Department publishes only aggregate data on the number of H-2B visas that were issued and denied and the countries of origin of H-2B workers; it does not publish data on individual H-2B workers or employers.

For the purposes of the analysis in this report, I look mainly at USCIS petition data from both the USCIS H-2B Employer Data Hub and USCIS *Characteristics of H-2B Nonagricultural Temporary Workers* reports, as described in this section.

Data limitations prior to 2021

Prior to 2021—when data from the USCIS H-2B Employer Data Hub first became publicly available—any attempt to count the total number of H-2B workers employed in a given year was incomplete because data on H-2B workers who were approved to continue their status with the same employer were not available, as noted above. At that time, the best available information on the size of the H-2B program came from three sources: disclosure data on labor certifications, which are published by the Department of Labor (DOL), the number of visas issued, which is published by the State Department, and the USCIS *Characteristics of H-2B Nonagricultural Temporary Workers* reports, which include aggregate data on the number of new H-2B workers.

Labor certifications show the number of H-2B jobs that have been certified by DOL to be filled with H-2B workers. However, they do not consider the H-2B cap—in other words, DOL will continue to approve them even if the H-2B cap has been reached. Therefore these certifications do not reflect the actual number of H-2B workers who are ultimately employed. Once DOL has certified the jobs employers wish to fill, the employers must then petition USCIS for H-2B workers. Before USCIS approves an H-2B petition, it must consider whether the H-2B job and petition fall under the annual cap. The result of this process is that every year there are many more labor certifications from DOL than there are petitions that are ultimately approved by USCIS allowing employers to hire H-2B workers.

The State Department's publication of the number of visas issued is another important data source. It provides the number of new H-2B workers who were issued visas at consulates abroad. However, these data also provide an incomplete picture, as they do not account for H-2B workers who had their visas extended and remained in the United States beyond the initial fiscal year for which they were approved or for H-2B workers who may have switched into H-2B from another status. They also do not account for H-2B workers who are exempt from the visa requirement. For these reasons, the State Department data, while useful, are also an imperfect source for measuring the number of H-2B workers.

The USCIS *Characteristics of H-2B Nonagricultural Temporary Workers* (hereafter, “*Characteristics*”) reports, which are available going back to fiscal year 2007,²³ provide the total number of new H-2B workers by adding the number of visas approved by the State Department to the number of new H-2B workers who were not issued visas, either because they were already present inside the United States, allowing them to switch into H-2B status without a new visa being issued, or because they did not require a visa to be admitted and work in H-2B status (the latter applies to certain Canadian and Bermudian citizens, Bahamian nationals, and British subjects resident in certain islands, who are permitted to apply for admission to U.S. Customs and Border Protection in H-2B status at a port of entry).²⁴ But data in the *Characteristics* reports also do not provide the number of H-2B workers who were approved to continue their status with the same employer.

New USCIS data help complete the picture

In 2021, USCIS began providing data, through the H-2B Employer Data Hub, on individual H-2B petitions that USCIS has adjudicated, for new or continuing employment, including how many petitions for H-2B workers were approved or denied, and whether each approval was counted under the original annual cap of 66,000 or the supplemental cap for the corresponding fiscal year, or whether the H-2B job was exempt from the caps. These newly released data date back to fiscal year 2015.

In using the Data Hub data, we must take note of the fact that data on approved petitions in the USCIS H-2B data may overcount the number of new individual H-2B workers. Some approved petitions may represent H-2B petitions for jobs that were never filled by H-2B workers. Or they may represent instances where a worker was changing employers, or changing their terms of employment with the same employer; in those cases, that individual may appear twice in the database in a given fiscal year. We do not have clarity from USCIS on how many approved petitions for new employment represent H-2B workers who changed employers or job conditions while at the same employer, making it difficult to estimate this potential overcount. That’s why the Data Hub data should not be used to estimate the number of new H-2B workers in a given fiscal year. Instead, the *Characteristics* reports should be utilized because they reflect the most accurate count of new H-2B workers in a given fiscal year.

The USCIS H-2B Employer Data Hub is, however, an essential source for completing the picture to get a more accurate estimate of the total H-2B worker population, because it captures the number of H-2B approvals for continuing employment—in other words, H-2B workers who extended their visa or status with the same employer. As noted above, these approvals are not included in the State Department data or *Characteristics* reports.

Thus, the data on new H-2B workers from the USCIS *Characteristics* reports (which includes the State Department data), in combination with new data on continuing approvals from the USCIS Data Hub, provide a more comprehensive picture of the size of the H-2B program than ever before.

The true size of the H-2B program from 2015 to 2021

While USCIS H-2B Data Hub data are available only going back to 2015—the year immediately before Congress first expanded the H-2B program through an appropriations rider—those data, combined with the data from the *Characteristics* reports, at least permit us to see what the baseline number of H-2B workers employed was before the expansions via supplemental visas.

Figure A shows that in 2015, while the statutory cap of 66,000 was still in place, the total number of H-2B workers was 76,370, of which 70,180 were new H-2B workers (as reported in the USCIS *Characteristics* report for that year²⁵) and 6,190 were visa extensions (as identified in the Data Hub data).

In 2021, when 22,000 supplemental H-2B visas were added to the statutory cap of 66,000, for a total cap of 88,000, there were a total of 116,684 H-2B workers. Those 116,684 H-2B workers included 97,129 new H-2B workers and 19,555 visa extensions.

The size of the H-2B program is projected to reach a new high in 2022

The number of H-2B workers is set to grow to a record high in fiscal year 2022. As discussed above, the Biden administration has added 55,000 supplemental H-2B visas to the 66,000 annual cap, setting the total limit for the year at 121,000. The last bar in Figure A (labeled “Projected”) shows an estimate of the number of H-2B workers for 2022. The 2022 estimate is constructed as follows: First, I take the number of H-2B workers in the cap set by the Biden administration of 121,000 for 2022, and presume that the full number will become new H-2B workers.²⁶

Second, the number of new H-2B workers in 2022 likely to be approved in excess of the total cap in 2022 must be estimated. Every year, there are more visas approved than the annual and supplemental caps, and the difference between the number of visas issued and the cap is likely represented by H-2B jobs that were not subject to either cap. To estimate this, I look at how many H-2B workers were approved above the cap of 88,000 in 2021, and use that total for the 2022 estimate.

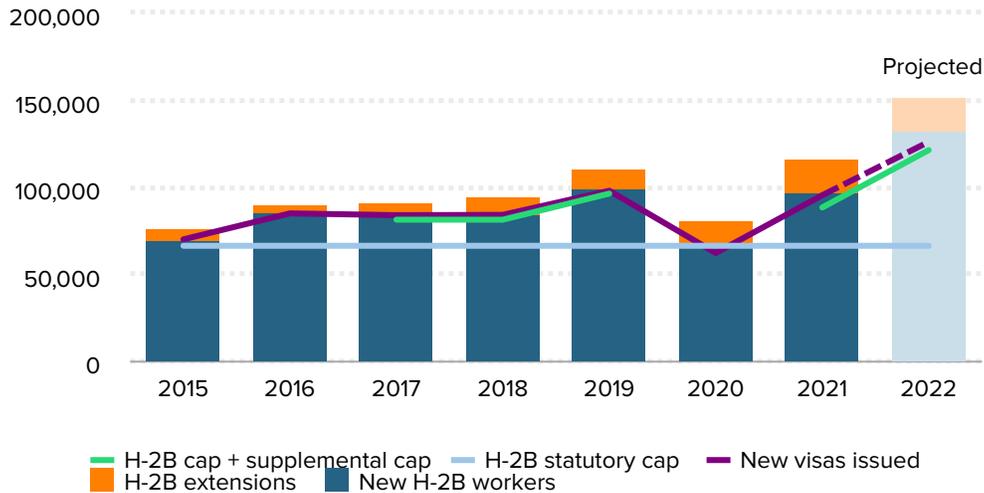
USCIS reported that there were 97,129 new H-2B workers in 2021, which is 9,129 more new H-2B workers than the total cap of 88,000.²⁷ Thus I add the estimate of 9,129 new H-2B workers approved above the total cap of 88,000 in 2021 to the 2022 cap of 121,000, for a total so far of 130,129.

Third, I add the 2021 number of new H-2B workers approved to change status into H-2B because they were already in the United States and thus did not require a visa (735), plus the 2021 number of nationals approved for H-2B who did not require a visa (1,341), as reported in the 2021 USCIS *Characteristics* report. This brings the projected total of new

Figure A

The H-2B visa program will grow to a record high in 2022—more than double the size of the original annual cap

Estimated number of H-2B workers employed in the United States, fiscal years 2015–2021, and projected for 2022



Notes: “New H-2B workers” represents the number of new H-2B workers estimated by United States Citizenship and Immigration Services (USCIS). “H-2B extensions” represents USCIS petitions for H-2B workers approved for continuing employment (i.e., visa extensions or extensions of status), as reported in the USCIS H-2B Employer Data Hub. “New visas issued” is the number of H-2B visas issued by the State Department. Projected totals for fiscal year 2022 are based on the statutory and supplemental caps for 2022, and 2021 data on visas issued and petitions approved for continuing employment (see text).

Source: EPI analysis of data from United States Citizenship and Immigration Services, U.S. Department of Homeland Security, [H-2B Employer Data Hub](#), fiscal year 2015–2021 data files; *Characteristics of H-2B Nonagricultural Temporary Workers* reports for fiscal years 2015–2021, available at the USCIS [Reports and Studies](#) page; and U.S. Department of State, “[Nonimmigrant Visa Statistics](#)” (see PDF files for tables listed under “Nonimmigrant Worldwide Issuance and Refusal Data by Visa Category” and “Nonimmigrant Visas by Individual Class of Admission” for fiscal years 2015–2021).

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H-2B workers for 2022 to 132,205 (represented in the light blue portion of the “Projected” bar in Figure A).

Finally, I add the number of approved petitions for continuing employment (H-2B extensions) from 2021 (19,555) as reported in the USCIS H-2B Employer Data Hub (yellow portion of “Projected” bar).

The final result is a projected total of 151,760 H-2B workers for 2022, a new record high and well over double the original statutory annual cap of 66,000.²⁸

Wage theft is a massive problem in the major H-2B industries: Employers have stolen \$1.8 billion from workers since 2000

The data are clear that the H-2B program is growing to unprecedented levels. Why does that matter? For many reasons. One clear cause for concern is the fact that data on labor standards enforcement from DOL's Wage and Hour Division (WHD) paint a picture of rampant wage theft and lawbreaking by employers in the industries that employ most H-2B workers. H-2B workers are being recruited into industries where they will be vulnerable, but no new measures have been implemented yet by the Biden administration to better protect them.

WHD publishes and annually updates tables with summary data on the outcomes of WHD enforcement actions in what it calls "industries with high prevalence of H-2B workers." The seven industries WHD lists in these data tables include landscaping services, janitorial services, hotels and motels, forestry, food services, construction, and amusement. Data on the top H-2B occupations (from DOL labor certifications and from the USCIS H-2B Employer Data Hub) show that the vast majority of H-2B jobs that are certified by DOL and approved by USCIS are within these broad industries.²⁹

Table 1 lists the top H-2B occupations by number of approvals in the USCIS H-2B Employer Data Hub. The listed occupations generally correspond with the seven "high H-2B prevalence" industries listed by WHD in their data tables and accounted for 99.1% of all H-2B approvals in 2021. If we exclude occupation #8, "N/A"—which represents data observations in which the occupation field was missing—the remaining nine occupations still account for 95.7% of all H-2B approvals in 2021.³⁰

The published WHD enforcement data include tables for individual fiscal years in four different categories.³¹ The first set of tables, "All Acts," includes data on violations of all wage and hour laws enforced by WHD in the listed industries. The second set of tables, "H-2B," summarizes employer violations of H-2B program laws and regulations. The next set, "FLSA," summarizes employer violations of the Fair Labor Standards Act. The final set, "All Others," summarizes violations of all laws that WHD enforces except for violations of FLSA or H-2B laws and regulations.

In the "All Acts" tables, the data fields listed by WHD in their enforcement data for the seven selected industries include:

- **Cases:** the number of cases investigated by WHD
- **Cases with violation:** the number of cases in which violations of the law were found

Table 1

Nearly all H-2B workers are employed in a small number of occupations

Top 10 H-2B occupations by number of USCIS-approved petitions, fiscal year 2021

| H-2B Rank | Major group SOC code | Occupation | Initial approval | Continuing approval | Total approvals | Share of total H-2B approvals |
|--|----------------------|---|------------------|---------------------|-----------------|-------------------------------|
| 1 | 37 | <i>Building and Grounds Cleaning and Maintenance Occupations</i> | 56,388 | 6,960 | 63,348 | 48.0% |
| 2 | 51 | <i>Production Occupations</i> | 13,087 | 2,674 | 15,761 | 11.9% |
| 3 | 45 | <i>Farming, Fishing, and Forestry Occupations</i> | 10,692 | 2,057 | 12,749 | 9.7% |
| 4 | 35 | <i>Food Preparation and Serving Related Occupations</i> | 6,744 | 3,262 | 10,006 | 7.6% |
| 5 | 39 | <i>Personal Care and Service Occupations</i> | 8,785 | 1,149 | 9,934 | 7.5% |
| 6 | 47 | <i>Construction and Extraction Occupations</i> | 7,270 | 1,052 | 8,322 | 6.3% |
| 7 | 53 | <i>Transportation and Material-Moving Occupations</i> | 4,512 | 576 | 5,088 | 3.9% |
| 8 | N/A | N/A | 3,191 | 1,424 | 4,615 | 3.5% |
| 9 | 49 | <i>Installation, Maintenance, and Repair Occupations</i> | 512 | 101 | 613 | 0.5% |
| 10 | 27 | <i>Arts, Design, Entertainment, Sports, and Media Occupations</i> | 520 | 22 | 542 | 0.4% |
| <i>Totals for the top 10</i> | | | 111,701 | 19,277 | 130,978 | 99.1% |
| <i>Totals for top 10 occupations excluding N/A</i> | | | 108,510 | 17,853 | 126,363 | 95.7% |
| <i>Total H-2B approvals, all occupations</i> | | | 112,546 | 19,555 | 132,101 | 100% |

Note: SOC stands for Standard Occupational Classification, which is a system of job classification created by the U.S. Department of Labor, see https://www.bls.gov/oes/current/oes_stru.htm#47-0000. N/A stands for not available; these were individual records in the H-2B Employer Data Hub that had blank fields for the column listing the occupation in an H-2B petition.

Source: United States Citizenship and Immigration Services, U.S. Department of Homeland Security, [H-2B Employer Data Hub](#), fiscal year 2021 data file.

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- **EEs (employees) employed in violation:** the number of employees involved in the cases in which violations were found
- **EE's ATP (employees' agreed to pay):** the number of employees who were found to be owed back wages as a result of the identified violations and to whom employers have agreed to pay the back wages owed
- **BW ATP (back wages agreed to pay):** the total amount of back wages that were assessed by WHD to be owed to workers and which employers have agreed to pay back to workers
- **CMP assessed:** the total amount of civil money penalties (CMPs) that were assessed to employers that committed violations. The assessment of CMPs is intended to deter future violations of wage and hour laws.

It is important to note that the violations and back wages owed that are detailed in these tables from WHD do not represent enforcement actions that involve only H-2B workers; they represent violations and back wages owed to *any* workers in the seven selected H-2B industries. These may include U.S. citizens, lawful permanent residents (i.e., green card holders), H-2B workers, or workers of any other immigration status, including unauthorized immigrant workers.

The WHD's "All Acts" tables provide these data for 22 fiscal years, from 2000 to 2021. **Table 2** in this report sums the total numbers of listed cases and employees involved, along with the total amounts of back wages owed and civil money penalties across all 22 fiscal years, adjusting the back wages owed and CMPs assessed to constant 2021 dollars.

Table 2 shows that across the 2000–2021 period, there were over 225,227 cases investigated by WHD, and violations were found in 180,451 of those cases, or 80% of cases. That means that whenever WHD initiates an investigation into an employer in these seven major H-2B industries, there is an 80% chance—a very high likelihood—that WHD will find employer violations.

Table 2 also shows that 1.8 million workers were involved—i.e., were potential victims—in the cases that detected violations, and nearly 1.7 million of those workers were assessed by WHD to have actually been victims of wage theft—that is, their employers had failed to pay them the full wages to which they were entitled by law.

For those 1.7 million employees, WHD assessed a total of nearly \$1.8 billion in back wages that were owed to them by their employers during the 22 fiscal years from 2000 through 2021. That's an average of nearly \$81.5 million stolen per year. Such a large dollar amount of stolen wages is particularly shocking when considering that most of the jobs in the seven major H-2B industries are associated with very low wages.³²

It's also important to remember that \$1.8 billion represents only the extent of wage theft detected in the cases WHD investigated. We have no way of knowing the actual amount of wages stolen in these industries. We do know that workers—both U.S. and migrant workers—often hesitate to report wage and hour and labor violations for fear of retaliation.³³ We also know that WHD has limited investigative capacity.³⁴ For these

Table 2

Employers have stolen \$1.8 billion in wages over the last two decades from workers in industries that employ H-2B workers

Back wages and civil money penalties assessed for wage and hour violations in industries with a high prevalence of H-2B workers, by industry, fiscal years 2000–2021

| Industry | Cases | Cases with violations | Employees involved in violation | Employees owed back wages | Back wages assessed (2021\$) | Average back wages owed per employee (2021\$) | Civil money penalties assessed (2021\$) |
|-----------------------------|---------|-----------------------|---------------------------------|---------------------------|------------------------------|---|---|
| All seven industries | 225,227 | 180,451 | 1,835,805 | 1,666,195 | \$1,792,259,236 | \$1,076 | \$114,791,387 |
| Landscaping services | 5,705 | 4,289 | 64,734 | 58,404 | \$60,088,422 | \$1,029 | \$4,833,676 |
| Janitorial services | 11,660 | 9,391 | 105,604 | 96,279 | \$96,808,594 | \$1,006 | \$3,289,109 |
| Hotels and motels | 22,469 | 18,501 | 150,452 | 140,864 | \$86,691,426 | \$615 | \$8,430,597 |
| Forestry | 1,479 | 1,102 | 13,089 | 10,860 | \$10,781,520 | \$993 | \$4,262,217 |
| Food services | 108,244 | 88,765 | 839,171 | 752,417 | \$654,970,169 | \$870 | \$64,575,989 |
| Construction | 68,012 | 52,441 | 591,131 | 542,034 | \$847,882,693 | \$1,564 | \$20,515,880 |
| Amusement | 7,658 | 5,962 | 71,624 | 65,337 | \$35,036,411 | \$536 | \$8,883,919 |

Notes: Tables include all violations of laws enforced in the selected industries by the Wage and Hour Division of the U.S. Department of Labor. The violations and back wages owed do not represent enforcement actions by the Wage and Hour Division that involve only H-2B workers; they represent violations and back wages owed to *any* workers in the seven selected H-2B industries. These may include U.S. citizens, lawful permanent residents (i.e., green card holders), H-2B workers, or workers of any other immigration status, including unauthorized immigrant workers. Dollar amounts reported in this table have been adjusted for inflation to constant 2021 dollars using the CPI-U-RS. As a result, the dollar amounts presented here may differ from the amounts reported in the source data. Totals may not sum due to rounding.

Source: EPI analysis of U.S. Department of Labor, Wage and Hour Division, “Industries with High Prevalence of H-2B Workers” [data tables for fiscal years 2000–2021].

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reasons, we suspect the actual extent of wage theft is higher—perhaps significantly higher—than \$1.8 billion.

In addition to the column headers available in the WHD tables, Table 2 includes an additional column (*vis-à-vis* DOL’s original tables) calculating the average back wages owed per employee who was assessed back wages. On average, each worker who was assessed back wages was owed \$1,076 by their employer. Back wages owed to workers were highest in construction, an average of over \$1,500 per worker. The second-highest amount of back wages owed per worker was in landscaping—the industry that every year accounts for nearly half of all H-2B jobs—at just over \$1,000 per worker.

In terms of civil money penalties (CMPs), the total amount of CMPs assessed during 2000–2021 was nearly \$115 million. The largest share, \$64.6 million (representing more than half of the total penalties), was assessed in food services. Construction accounted for nearly 18% of the CMPs assessed, at \$20.5 million.

The H-2B program does not adequately protect the rights of migrant workers

Not only are migrant workers brought into industries where wage theft is a major problem, but workers employed through the H-2B program do not have equal rights with other workers. Migrant workers make vital contributions to the U.S. economy, and hiring them to fill labor shortages is a valid use of immigration policy, as many nations allow and facilitate. But it should go without saying that the workers who are hired in those instances deserve equal rights, fair pay, protections from retaliation, and a path to permanent residence and citizenship. Sadly, the H-2B program does not meet any of these standards.

Instead, the H-2B program empowers employers to legally exert an unreasonable amount of control over migrant workers, who often must incur substantial debt to labor recruiters in order to secure jobs in the United States.³⁵ H-2B workers are, in effect, captive, because their visa status is controlled by their employer.³⁶ This means that if an H-2B worker isn't paid the promised wage or is forced to work in an unsafe workplace, the worker is unlikely to speak up or go to the authorities. Complaining can result in getting fired, which leads to becoming undocumented and possibly deported. It also means not being able to earn back the money that was invested to obtain the temporary job.

These problems, which are inherent in the H-2B program, are well documented. There are numerous cases of litigation,³⁷ investigative media reports,³⁸ government audits,³⁹ and studies⁴⁰ revealing how migrants employed through the H-2B program arrive in the United States with massive debt, are often exploited and robbed by employers, and even become victims of human trafficking. The Subcommittee on Workforce Protections, part of the Education and Labor Committee in the House of Representatives, recently explored the vulnerabilities of H-2B workers in a hearing titled, "Second Class Workers: Assessing H2 Visa Programs' Impact on Workers."⁴¹ It is clear that the H-2B's legal framework creates vulnerabilities for H-2B workers that enable exploitation and degrade wages and working conditions for all workers in major H-2B occupations.⁴²

The vulnerabilities faced by H-2B workers only increased during the pandemic.⁴³ For example, as noted above, the Trump administration enacted emergency rules to make it easier for employers to hire H-2B workers and extend their visas if they were already in the United States. This action was at least a tacit acknowledgment that H-2B workers were in so-called essential occupations and doing important work. However, the Trump administration failed to take any corresponding emergency measures to protect H-2B workers, including from employers who might act negligently or recklessly when it came to protecting the health of their H-2B employees. The result was, for example, reports about H-2B workers being fired and threatened with immigration enforcement in retaliation for going to the hospital for a COVID-19 test and medical care.⁴⁴

Considering the fact that the precarious immigration status of H-2B workers hinders their ability to come forward and complain when their employers break the law, and the reality

that H-2B workers are being employed in industries where violations are so frequent, it is clear that in order to protect H-2B workers, DOL should be applying more scrutiny to H-2B employers in these industries, with random audits or pre-screening procedures.

In addition, Congress needs to put an end to the practice of making immigration policy through appropriations riders. The appropriations riders that are still in place prohibiting DOL from enforcing the corresponding employment and three-fourths rules—which help ensure that U.S. workers and H-2B workers are paid equally for the same work and that H-2B workers are guaranteed three-fourths of the hours on their job contracts—have hamstrung the ability of DOL to protect workers in H-2B industries. The Office of Foreign Labor Certification (OFLC) in DOL has also noted in its budget report that the H-2B riders “significantly limit the Department’s ability to implement and enforce some important wage and work guarantees for H-2B and U.S. workers” and called on Congress to repeal them.⁴⁵ More specifically, with respect to the employer-provided wage survey rider, OFLC noted that the “prevailing wage rider has the effect of undercutting the wages of U.S. workers in the occupation by allowing employers to pay foreign and U.S. workers lower wage rates.”⁴⁶

Considering these existing challenges to protecting H-2B workers, more should be done on the front end of the H-2B application process to prevent lawbreaking employers from using the H-2B program. The next section proposes an action the Biden administration could take to achieve this.

New rules and a screening procedure are needed to prevent lawbreaking employers from hiring through the H-2B program

In addition to the systemic flaws in the H-2B program, the enforcement data from the Wage and Hour Division prove that H-2B workers are being employed in industries where millions of workers are robbed regularly by employers. But at present, no laws or regulations prevent employers from hiring through the H-2B program if they have been found to have committed any labor, wage and hour, civil rights, or anti-discrimination laws. Employers can be barred by DOL from the H-2B program for violating H-2B laws or regulations, but such examples are rare, and some repeat violators of H-2B laws and regulations continue to be able to hire through H-2B.⁴⁷

Given the high prevalence of wage and hour violations in major H-2B industries, there is a strong case for DOL to require employers to register for eligibility to use the program, so their records on compliance with labor and employment laws can be screened up front. To break established patterns of abuse, employers that have violated labor, employment, and any wage and hour laws should be prohibited from hiring H-2B workers. Given the present and likely future reality that WHD will continue to be vastly underfunded and

understaffed,⁴⁸ such a screening process on the front end of the H-2B application process could act as a useful and efficient tool to prevent cycles of abuse without WHD having to go through lengthy and costly investigations on the back end, after workers have arrived in the United States and been robbed or otherwise exploited. This would also benefit employers with clean records by allowing them to hire more workers under the H-2B cap.

One possible model that could be adapted by DOL is currently operated by USCIS, namely, their Electronic Registration Process for employers hiring through another visa program, H-1B. USCIS describes the H-1B Electronic Registration Process as a system whereby employers “and their authorized representatives, who are seeking to employ H-1B workers subject to the cap, complete a registration process that requires only basic information about the prospective petitioner and each requested worker.”⁴⁹ After that, USCIS takes the “properly submitted electronic registrations” and “[o]nly those with selected registrations will be eligible to file H-1B cap-subject petitions.”⁵⁰

While the H-1B Electronic Registration Process is mainly designed to streamline processes for employers, the model could be adapted by DOL as part of the application process at the labor certification stage. For example, DOL could set up a registration process in which employers list basic information about their business and the purported need for H-2B workers (as is already done via the DOL labor certification attestation forms). As part of that new process, employers could be required to attest, under penalty of perjury and of being banned from hiring through H-2B, that they have not been found to have violated any labor, wage and hour, civil rights, or anti-discrimination laws during the past five years. DOL could then attempt to verify by cross-referencing enforcement data and other relevant records, and ultimately certify employers that have not been found to have violated the applicable laws. Employers that are certified by DOL could then continue on with the labor certification process.⁵¹

Before increasing the H-2B cap again, President Biden should push for and implement major structural reforms

President Biden and his administration should send a message to workers and the business community that a major reform of the H-2B program is long overdue and needs to move forward. Rulemaking should prohibit lawbreaking employers from hiring through H-2B and should ensure that migrant workers and U.S. workers in the major H-2B industries will be treated and paid fairly. In addition, President Biden should announce support for the *Seasonal Worker Solidarity Act*, an H-2B reform bill proposed by Rep. Joaquin Castro (D-Texas) that would revamp the H-2B program by providing migrant workers with new protections, fairer wages, and a path to citizenship, as well as improving the system for recruitment to ensure that employers make an adequate and genuine attempt to recruit and hire U.S. workers for open temporary and seasonal jobs before seeking to recruit H-2B workers.⁵²

President Biden already has the legal authority to direct the leadership at the Department of Homeland Security and the Department of Labor to implement the many needed reforms through new or updated joint regulations and agency guidance. In fact, it was reported by NPR on May 27, 2022, that changes to the H-2B visa program are under consideration by the Biden administration.⁵³ The NPR report discusses a letter from DHS Secretary Alejandro Mayorkas, responding to a letter from Sen. John Ossoff (D-Ga.) inquiring about a human trafficking case in Georgia that involved another visa program, the H-2A visa for agricultural workers. Secretary Mayorkas wrote to Sen. Ossoff that DHS “plans to undergo rulemaking to reform the H-2A and H-2B programs, with a focus on addressing aspects of the program that may result in the exploitation of persons seeking to come to this country as H-2A and H-2B workers.”

Secretary Mayorkas’s letter is evidence that the Biden administration acknowledges the flaws in the H-2B program and that it will make an attempt to protect H-2B workers through the regulatory process. If and when those regulations are proposed and ultimately promulgated, they should include, at a minimum:

- the creation of a new registration system at DOL to screen and prohibit employers with a record of violating labor, wage and hour, civil rights, and anti-discrimination laws from hiring through the H-2B program, as proposed in this report;
- new regulations on wages and worker protections that require employers to pay the highest of the local, state, or national average wage for the specific job, and that end the use of employer-provided wage surveys to set H-2B wage rates;⁵⁴
- improvement of the January and May 2022 temporary final rules that provide H-2B workers with limited portability to change jobs and employers;⁵⁵ and
- the creation of an affirmative process for deferred action and work authorization for all workers with temporary visas, as well as undocumented workers, who are involved in labor disputes with employers, along with clear written guidance on how workers can request these protections.⁵⁶

These executive reforms would ensure that H-2B workers are paid fairly and have the freedom to come forward to report abuses by employers, and they would also help prevent employers with records of violating labor and employment laws from hiring through the H-2B program.

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43. Daniel Costa, *Temporary Work Visa Programs and the Need for Reform: A Briefing on Program Frameworks, Policy Issues and Fixes, and the Impact of COVID-19*, Economic Policy Institute, February 3, 2021.
44. Christine Murray, “Mexican Seafood Workers Fight Back over U.S. Coronavirus Sacking,” *Reuters*, June 16, 2020.
45. U.S. Department of Labor, *FY 2023 Congressional Budget Justification: Employment and Training Administration, State Unemployment Insurance and Employment Service Operations*, accessed July 26, 2022, see page 69.
46. U.S. Department of Labor, *FY 2023 Congressional Budget Justification: Employment and Training Administration, State Unemployment Insurance and Employment Service Operations*, accessed July 26, 2022, see page 69.
47. See, for example, Ken Bensinger, Jessica Garrison, and Jeremy Singer-Vine, “The Pushovers: Employers Abuse Foreign Workers. U.S. Says, By All Means, Hire More,” *Buzzfeed News*, May 12, 2016.
48. See, for example, Ihna Mangundayao, Celine McNicholas, and Margaret Poydock, “Worker Protection Agencies Need More Funding to Enforce Labor Laws and Protect Workers,” *Working Economics Blog* (Economic Policy Institute), July 29, 2021; and section on WHD funding and enforcement in Daniel Costa, Philip Martin, and Zachariah Rutledge, *Federal Labor Standards Enforcement in Agriculture: Data Reveal the Biggest Violators and Raise New Questions About How to Improve and Target Efforts to Protect Farmworkers*, Economic Policy Institute, December 15, 2020.
49. USCIS, “H-1B Electronic Registration Process,” U.S. Department of Homeland Security.
50. USCIS, “H-1B Electronic Registration Process,” U.S. Department of Homeland Security.

51. This process could also take place at the USCIS petition stage like the H-1B Electronic Registration Process, but that would cause DOL to certify H-2B jobs that would not be able to be filled if employers were later prohibited from filing H-2B petitions, and DOL likely has access to the relevant enforcement data for verifying employer attestations, making DOL the ideal agency to conduct the registration process.
52. H.R. 7549, *Seasonal Worker Solidarity Act of 2022*, introduced April 21, 2022. See also Office of Joaquin Castro, “[Congressman Castro Introduces H-2B Visa Reform Bill to Strengthen Protections for Seasonal Workers](#)” (press release), April 22, 2022. For more background on the first version of the bill, see Benjamin Wermund, “[Rep. Joaquin Castro Proposes Path to Citizenship for Workers with H-2B Visas](#),” *San Antonio Express-News*, December 15, 2020.
53. Ximena Bustillo, “[A Human-Trafficking Case Exposed Farmworker Abuses. The Government Is Promising Change](#),” NPR, May 27, 2022.
54. For more background on this proposal, see Daniel Costa, “[Wages Are Still Too Low in H-2B Occupations: Updated Wage Rules Could Ensure Labor Standards Are Protected and Migrants Are Paid Fairly](#),” *Working Economics Blog* (Economic Policy Institute), March 18, 2021.
55. For example, see the recent proposal on the ability of H-2A and H-2B workers to change jobs and employers from the Migration that Works coalition: “[MTW’s Recommendations to DHS Towards Ensuring Mobility for H2 Workers](#),” May 17, 2022.
56. DOL recently issued guidance in the form of a four-page “Frequently Asked Questions” document aimed at immigrant workers who have come forward to report labor and workplace abuses or are considering doing so. The FAQ informs these workers how to seek DOL’s support when requesting immigration status protections from DHS. The guidance helps formalize the process of supporting immigrant workers in labor disputes, which will benefit both undocumented workers and migrants with nonimmigrant work visas like H-2B, which provide only a precarious, temporary immigration status and which are controlled by employers and do not allow workers to change jobs. For this process to ultimately be a success, however, DHS also needs to issue guidance that complements DOL’s guidance and to formalize the process for how immigrant workers in labor disputes can request immigration status protections; immigrant and worker advocates have been calling for formalization of this process. See U.S. Department of Labor, “[US Department of Labor Posts Process for Seeking Its Support for Immigration-Related Prosecutorial Discretion During Labor Disputes](#)” (news release), Office of the Solicitor, July 6, 2022. See also Migration that Works coalition, “[Migration that Works welcomes the latest @USDOL FAQ supporting immigration-related prosecutorial discretion for immigrant and migrant workers in labor disputes](#),” Twitter, @MigrationthtWks, July 21, 2022, 5:38 p.m.; and Emily Brill, “[DOL Releases Guidance for Immigrants in Labor Disputes](#),” *Law360*, July 7, 2022.