

# **EPI comments on DHS proposed rule on “Modernizing H-2 Program Requirements, Oversight, and Worker Protections”**

**Public Comments** • By **Daniel Costa** • November 20, 2023

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TO: Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security

Attention:  
Charles L. Nimick  
Chief, Business and Foreign Workers Division  
Office of Policy and Strategy  
U.S. Citizenship and Immigration Services  
Department of Homeland Security  
5900 Capital Gateway Drive  
Camp Springs, MD 20746

**RE: *Modernizing H-2 Program Requirements, Oversight, and Worker Protections*, Proposed Rule by the Department of Homeland Security, CIS No. 2740-23 and DHS Docket No. USCIS-2023-0012, RIN: 1615-AC76, 88 Fed. Reg. 65040 (September 20, 2023)**

Dear Secretary Mayorkas and Chief Nimick:

Thank you for the opportunity to submit this comment in response to the invitation from United States Citizenship and Immigration Services (USCIS) in the Department of Homeland Security (DHS) for public comment on its Notice of Proposed Rulemaking (NPRM) entitled “Modernizing H-2 Program Requirements, Oversight, and Worker Protections,” which proposes to amend many of the regulations governing the terms and conditions of employment in the H-2A and H-2B visa programs, including many important new enhancements to provide workers with more protections and flexibility in their employment.

## ABOUT EPI

The Economic Policy Institute (EPI) is a nonprofit, nonpartisan think tank established in 1986 to include the needs of low- and middle-income workers in economic policy discussions. EPI conducts research and analysis on the economic status of working America, proposes public

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policies that protect and improve economic conditions and raise labor standards for low- and middle-income workers—regardless of immigration status—and assesses policies with respect to how well they further those goals.

EPI has researched, written, and commented extensively on the U.S. system for labor migration, including in particular the H-2A and H-2B programs and other temporary work visa programs, as well as on farm labor issues, including labor standards enforcement in agriculture and in major H-2B industries. EPI has also provided expert testimony about work visa programs to both the U.S. Senate and House of Representatives, as well as state legislatures, and recently published reports examining federal data on wage and hour enforcement in agriculture and in H-2B industries.

## **BROAD SUPPORT FOR THE PROPOSED RULE**

Given the numerous reports from advocates, news investigations, and even government audits over many years that have revealed how deeply flawed the H-2A and H-2B programs are when it comes to protecting the rights of both migrant workers and U.S. workers, EPI welcomes and appreciates the attempt by DHS to strengthen worker protections through this Notice of Proposed Rulemaking (NPRM).

There were approximately 470,000 H-2A and H-2B workers employed in the United States in 2023, a record number that is comparable to the Bracero Program at its peak. But the H-2 programs—like most other U.S. temporary work visa programs—have denied workers the freedom to leave an abusive, lawbreaking employer, creating a power imbalance that has led to countless cases of wage theft and other forms of exploitation, as well as helped facilitate human trafficking. Obviously, such programs do not comport with basic human and labor rights, and the recent rapid growth and sheer size of the H-2 programs means that reforming them is an urgent national priority.

While many of the most important and durable changes that are needed in the H-2 programs will require legislation, EPI commends DHS for proposing to take important steps to improve worker power.

*Thus, EPI broadly supports the proposed rule, subject to the recommended changes discussed herein, and especially applauds DHS for responding to many of the recommendations of worker advocates by proposing increased portability and an unemployment grace period for H-2 workers and additional oversight of recruiters and employers that utilize the H-2 visa programs.*

**EPI also endorses and supports the written comments and recommendations submitted by the *Migration that Works* coalition, which EPI is a cofounding member of, and which include a multitude of organizations that represent both U.S. workers and migrant workers, including H-2A and H-2B workers.**

*EPI incorporates the comments and recommendations submitted by the Migration that*

*Works coalition by reference into this comment.*

While more detailed comments addressing many of the NPRM's provisions can be found in the comment submitted by the Migration that Works coalition, this comment should be considered an addendum to Migration that Works comment, which provides additional analysis in support of the NPRM's provisions, but with key additional recommendations, including one urging that USCIS count H-2B petitions for continuing employment against the annual numerical limit in the H-2B program, and another for USCIS to take additional measures to prohibit lawbreaking employers from hiring through the H-2 programs, and to operationalize this through the creation of a front-end screening process.

## **PORTABILITY AND THE H-2B ANNUAL CAP**

Portability for H-2 workers is an important development, and EPI applauds DHS for responding to the calls from worker advocates to allow workers to change jobs and employers. Indeed, the ability to change employers is a basic fundamental freedom for all workers, including migrant workers—and the bare minimum for a temporary labor migration scheme that comports with basic human and labor rights. Bringing enhanced portability to the H-2 programs, if done right, will undoubtedly be a tool to empower workers. However, portability must not be implemented in ways that enable employers to work around the annual numerical limit to the H-2B program which Congress has set in statute. The NPRM fails to adequately assess the impact of the type of portability proposed on the growth and overall size of the H-2B program that will result, or to put in place safeguards that ensure employers do not circumvent the annual cap. This section addresses the issue and urges DHS to reassess how it counts H-2B positions for workers who extend or change jobs in the H-2B program, and to count those positions against the annual cap.

### **The size of the H-2B program has expanded rapidly and reached record levels**

The NPRM notes the exponential growth of the H-2 programs and discusses the recent total numbers of H-2B petitions that have been approved and petitions filed for an extension of stay due to a change of employer,<sup>1</sup> but does not discuss how many extensions of stay there were for H-2B workers with the same employer or ultimately, what the true size of the H-2B program currently is, in terms of the total number of H-2B workers employed in a given fiscal year. Nor do currently available data allow the public to know how many total positions were filled with H-2B workers, which is critical to know since H-2B workers who change employers or extend with the same employer will have filled two positions under one slot under the annual cap.

As this subsection will discuss, the total number of beneficiaries approved (which is listed in the NPRM) or the number of visas issued by the Department of State is not the same as

the total number of workers who were employed in the United States in a given fiscal year, nor is it the same as the number of positions that were filled. But the total number of both is relevant and essential to know because the statute sets an annual numerical limit that must be adhered to. Recent data suggest that the H-2B program has grown far beyond the number set in the original annual cap set out at Section 205 of the Immigration Act of 1990<sup>2</sup>—and even far beyond the larger annual cap that has been set by DHS as a result of the congressional appropriations riders that have been included in omnibus legislation since fiscal year 2016.

The USCIS *Characteristics of H-2B Nonagricultural Temporary Workers* reports (hereafter, “*Characteristics*” reports), which are available going back to fiscal year 2007,<sup>3</sup> 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.<sup>4</sup> But data in the *Characteristics* reports do not provide the number of H-2B workers who were approved to continue their status with the same employer or who were approved to change employers.

In 2021, USCIS began providing new 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 numerical 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 total approved petitions in the USCIS H-2B data likely overcounts the number of total 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 as a starting point because they reflect the most accurate count of new H-2B workers in a given fiscal year, but exclude the number of H-2B workers who changed jobs or extended their status.

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 “continuing approvals”—which according to the H-2B Employer Data Hub Glossary, includes the number of H-2B workers approved for “continuing employment, change of employer, and amended petitions.”<sup>5</sup> In other words, those data include H-2B workers who extended their status with the same employer, changed employers, or amended the terms of their current employment. 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 now available 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.

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 program expansions via supplemental visas that were authorized via congressional appropriations riders.

**Figure A** below 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 year)<sup>6</sup> and 6,190 were approved H-2B petitions for continuing employment (from the Data Hub data), which as just noted represent H-2B workers who either extended their status with the same employer, changed employers, or amended the terms of their current employment.

In 2021, 22,000 supplemental H-2B visas were added by DHS to the statutory cap of 66,000, for a total cap of 88,000. Using this methodology to derive the total number of H-2B workers, there were a total of 116,684 H-2B workers in 2021. Those 116,684 H-2B workers included 97,129 new H-2B workers (as identified in the *Characteristics* report), and 19,555 approved petitions for continuing employment.

In 2022, a total of 55,000 supplemental visas were added by DHS to the statutory cap of 66,000, for a total cap of 121,000. USCIS identified in the *Characteristics* report that there were a total of 126,426 new H-2B workers in 2022, and Data Hub data show that there were 29,504 approved petitions for continuing employment, amounting to a total of 155,930 total H-2B workers.

While the *Characteristics* report for fiscal year 2023 is not yet finalized and the numbers in the Data Hub do not appear to be finalized yet either, it is not difficult to derive a reasonable estimate of the total number of H-2B workers who were employed in 2023:

On December 15, 2022, DHS announced<sup>7</sup> they were adding 64,716 supplemental H-2B visas to the 66,000 annual cap, setting the total limit for the 2023 fiscal year at 130,716. Based on that, the 2023 estimate is constructed as follows: First, I presume that there were enough H-2B workers to fill the entire cap set by DHS of 130,716.

Second, the number of new H-2B workers in 2023 likely to be approved in excess of the total cap in 2023 can be estimated based on the number that were previously approved beyond the cap (likely representing H-2B workers who were not subject to the cap), plus those that will be approved for continuing employment. In 2022, the total annual cap was 121,000, but the total number of new workers reported by USCIS in the *Characteristics* report was 126,426. That's a difference of 5,426 new H-2B workers who were approved in excess of the annual cap. I take the same number in excess of the cap from 2022 and add

them to the 2023 cap. Together they equal 136,142, which I round to 136,000.

Next, I estimate and add the number of approved petitions for continuing employment. In 2022, that number was 29,504 as reported in the USCIS H-2B Employer Data Hub (see yellow portion of the figure for 2022). In 2022, the number of continuing approvals was nearly 19% of the total of H-2B workers in 2022 (29,504 divided by 126,426). Based on this share, I estimate that the total number of H-2B workers in 2023 will be 168,000, with 32,000 of the workers being approved petitions for continuing employment. (See the last bar in Figure A, labeled “Projected.”) I estimate the number of approved petitions for continuing employment to be 32,000 because 32,000 continuing approvals would be 19% of the total number of H-2B workers in 2023, the same share there was in 2022. (This assumes no increase in the share of continuing approvals, likely making it a lower-bound estimate.)

*The projected total of 168,000 H-2B workers for fiscal year 2023 will be a new record high and more than two and a half times the original annual cap of 66,000.*

## **If H-2B portability is not subject to the annual cap, it will result in a large de facto expansion of the program**

The true size of the H-2B program matters because the new portability, as proposed in the NPRM, will lead to an even larger de facto expansion of the H-2B program. Already, there is a strong correlation between the portability flexibilities that were announced by DHS as a result of the COVID-19 pandemic—which were later extended through January 2024<sup>8</sup>—and the rapid increase in the number of approved petitions for continuing employment, which include H-2B workers who extended their stay for another period or who changed jobs to work for a new employer, or who had amended petitions. (See Figure A above, which shows the number of continuing approvals increasing sharply beginning in 2020.) While the approach taken to give employers additional flexibility in recent years and in the context of the pandemic was arguably acceptable given that it was done on an emergency basis—that approach mainly benefitted employers, rather than workers<sup>9</sup>—and those temporary rules were implemented almost entirely without notice and comment, and with little or no analysis regarding the impact on the program, worker rights, or the statutory annual cap.

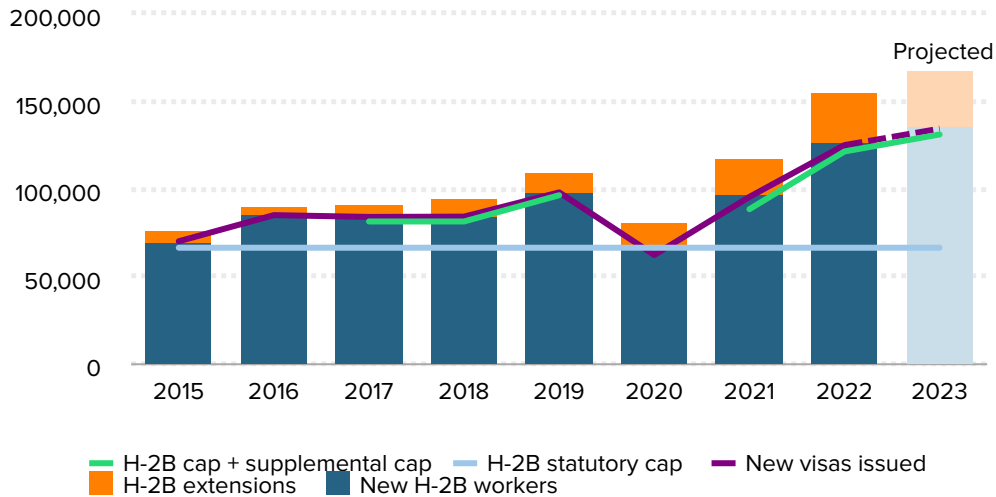
As noted earlier, EPI applauds the portability that is finally being implemented for H-2 workers, it is long overdue, although important improvements are needed to make it effective in practice for workers, as discussed in this comment and the comment submitted by the MTW coalition.

Portability should primarily act as a tool that empowers workers and provides them with basic freedom in the labor market. However, as presently proposed, DHS will also end up providing employers with a way to evade the statutory limits set in the H-2B cap. If H-2B workers are able to fill additional jobs beyond their first job for up to three years, and if

Figure A

## The H-2B visa program grew to a record high of 156,000 in 2022—and will reach 168,000 in 2023—more than two-and-a-half times the annual cap

Estimated number of H-2B workers employed in the United States, fiscal years 2015–2022, and projected for 2023



**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 2023 are based on the statutory and supplemental caps for 2023, and 2022 data on new H-2B workers and petitions approved for continuing employment (see text of [EPI report](#) from August 2022).

**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 2015–2022 data files; *Characteristics of H-2B Nonagricultural Temporary Workers* reports for fiscal years 2015–2022, 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 2015–2022).

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USCIS continues to make available the maximum number of supplemental H-2B visas as it has for fiscal years 2023 and 2024, the true size of the H-2B program will approach triple the size of the total cap (i.e. annual plus supplemental cap) of 130,716—meaning the H-2B program could reach close to a total of 400,000 workers.

The original numerical limit that was set in statute in 1990 intended to limit the number of H-2B workers that can be admitted and the number of positions that can be filled by H-2B workers in any given fiscal year. It is true that the statute is silent as to whether H-2B nonimmigrants who have been admitted temporarily are allowed to fill second, third, or even fourth positions during one continuous period of stay, without being counted against the numerical cap. DHS on its own has determined via regulation that H-2B workers may remain in the country for up to three years and may take on additional jobs without being counted against the cap, and in fact this is long-standing practice, but such practice is



likely inconsistent with the intention of Congress when it set an annual numerical limit at 66,000. Furthermore, it is highly unlikely that Congress in 1990, or even Congress in fiscal years 2017 to 2023 when it allowed DHS to increase the size of the program up to 130,716 workers—intended for the *true* size of the program to grow to close to 400,000 workers.

## **DHS must count approved petitions for continuing employment against the annual cap**

To protect against what amounts to a de facto exemption from the H-2B cap for employers, employers that employ H-2B workers who are extending their status or who begin employing a worker who is already in H-2B status but is transferring from a different employer, must have those positions counted against the H-2B cap by DHS. Permitting H-2A and H-2B workers to have the basic freedom to change jobs in the U.S. labor market is an urgent priority—but it should not be coupled with the continued treatment of such petitions as exempt from the annual cap. Thus, to ensure employer accountability and program integrity, any new H-2B job filled by an H-2B or H-2A worker who is transferring employers must be newly subject to the statutory cap, and any new period of employment by an H-2B worker who remains with their same H-2B employer (i.e. every approved petition for continuing employment in H-2B status) must be newly subject to the H-2B annual cap.

DHS has the authority to reconsider how they count H-2B workers and periods of employment under the cap, and should reconsider past practice so that all H-2B petitions for new and continuing employment, and for changing employers, are subject to the annual numerical limit. Failure to do so will result in a large and rapid de facto expansion of the H-2B program that is not consistent with the original or updated statutory numerical limitations set by Congress.

While this will require operational changes at DHS, it is an essential change that should be integrated into the final rule. Since H-2B numbers during any given fiscal year are assigned very early in the fiscal year, and even sometimes before the fiscal year begins, the simplest way to implement this change would be to count an approved continuing petition against the annual cap for the following fiscal year. This will keep the size of the H-2B program closer to what Congress originally intended and envisioned. An additional benefit will redound to workers, because employers will be incentivized to improve pay and working conditions so that H-2B workers are not enticed to leave for better opportunities.

## **DHS has not provided estimates on H-2B program growth that will result from the NPRM and thus has not adequately assessed its impact**

It is in fact, quite troubling that DHS has not included an impact assessment in the NPRM regarding the size of the H-2B program that will result from the permanent and expanded

portability proposed in the NPRM, if petitions approved for H-2B workers changing employers or continuing employment with the same employer continue to be exempt from the annual numerical limit. Failure to provide such estimates on the resulting size of the H-2B program—which as discussed above, may quickly approach 400,000—prevent the public from understanding the full impact that the NPRM will have on the size of the H-2B program and the U.S. labor market.

## **ENFORCEMENT AND EMPLOYER ACCOUNTABILITY**

### **EPI supports DHS’s proposal for additional mandatory and discretionary bars to approval of H-2 petitions, but recommends that DHS take additional measures**

The proposed rule also creates or expands several additional bars to approval of new petitions filed by H-2 petitioners who have previously committed other violations related to the H-2 programs. EPI generally supports these proposed changes, which if adequately implemented will help curb abusive employers’ exploitation of the H-2 programs and will level the playing field for employers that obey the law. Proposed section 214.2(h)(10)(iii) would require USCIS to deny petitions filed by petitioners who are currently debarred by the Department of Labor (DOL) during the debarment period, as well as those filed by petitioners who have been subject to a final denial or revocation of an H-2 petition in the past three years based on fraud or willful misrepresentation. This section would also expand from two years to three years the period in which USCIS is required to deny the application of a petitioner who has been convicted of certain immigration violations that carry criminal penalties. EPI supports these changes and consider the Department’s proposed three-year timeframe appropriate for first-time offenders. However, employers that commit these serious violations repeatedly should be permanently banned from the H-2 programs, as they have demonstrated their inability or unwillingness to comply with the programs’ requirements.

In addition, DHS proposes to authorize USCIS to deny H-2 petitions for a period of up to three years where a petitioner has committed certain violations that “call into question the petitioner’s or successor’s intention or ability to comply with H-2 program requirements.”<sup>10</sup> In addition, we believe that because these provisions require USCIS to find that the underlying violation calls into question the petitioner’s “intention or ability to comply with the H-2 program requirements” before denying a petition, the Department should not limit this provision to a three-year look-back period. A particularly severe labor violation five years ago could still indicate a petitioner’s inability or unwillingness to comply with the H-2 program requirements, while a relatively minor one that occurred only a year ago might not. Because “recency” of a past violation is already a factor USCIS would be instructed to

consider in determining whether to deny a petition, the three-year timeframe should be removed.

## **DHS should create a list of legal violations and make denial of petitions mandatory if employers have violated any of those laws in the preceding five years, and cooperate with DOL to create a front-end screening process to prohibit lawbreaking employers from hiring through the H-2 programs**

While EPI's support for the proposals in these related sections are already reflected in the Migration that Works comment, we additionally recommend that the Department strengthen section 214.2(h)(10)(iii)(3), which addresses violations of "any applicable employment-related laws and regulations" by expanding it to include a number of other violations and making denial of petitions mandatory—rather than discretionary—if employers have violated any of those laws in the preceding five years.

Ideally, to implement this, USCIS should cooperate with DOL to develop a front-end screening process that takes place at the labor certification level, to vet the labor and employment law records of employers before they can be allowed to hire through the H-2 program. In multiple EPI reports and in a recent comment in response to an NPRM from DOL on worker protections in the H-2A program, EPI has made similar proposals—namely, that a front-end screening process should be created to prohibit employers with track records of wage and hour, labor, and other legal violations from hiring through the H-2 programs.

But, at a minimum, USCIS should have its own list of legal violations and deny any petition for an employer that has violated any of the laws on the list in the preceding five years. That would act as a backstop to prevent lawbreaking employers from hiring through the H-2 programs. At present, as USCIS rightly points out, even some of the worst violators of the law are allowed to recruit and hire H-2 workers. And then after they violate the law, by, for example, robbing wages from their H-2 workers, the H-2 employees are afraid to complain to authorities because their immigration status is tied to their employer, and even if they are brave enough to lodge a complaint, DOL may lack the resources to investigate employment violations and hold the employer accountable. This section discusses the rationale for USCIS having a list of laws, with a rule that requires the denial of any petition from an employer that has violated any of those laws in the past five years, as well as a front-end screening process to implement the rule and how it could function in practice.

In the H-2A context, as EPI research recently showed, there has been a clear downward trend in the number of closed investigations of agricultural employers by the U.S. Department of Labor's Wage and Hour Division (WHD) over the past two decades, from

more than 2,000 a year in the early 2000s, to 1,000 or fewer a year during the last two fiscal years, i.e., during the Biden administration. In 2022, WHD closed only 879 investigations of agricultural employers—a record low during the 2000 to 2022 period—amounting to an average of 73 a month. 879 investigations in 2022 is just over a third of the 2,431 agricultural investigations closed in 2000, the peak year for WHD agricultural investigations.<sup>11</sup> The low number of investigations means that most farms are never investigated by WHD; in fact fewer than 1% of agricultural employers are investigated per year. Since farm operators know there is a very low likelihood that they will ever be investigated, some may feel emboldened to have a business model that relies on wage theft and other forms of lawbreaking.

Despite the low and declining number of investigations, when WHD investigators do inspect an agricultural employer, they nearly always detect violations of wage and hour laws. As a report I coauthored in 2020 showed, WHD detects violations 70% of the time they conduct an investigation—a sign that many agricultural employers are violating the law. Among the 70% of investigations that detected violations between 2005 and 2019, almost 40% found one to four violations on the farm and 31% found five or more.<sup>12</sup>

Why are there so few investigations of agricultural employers? A major reason is too little funding and staffing for worker protection agencies, especially WHD, which is tasked with enforcing H-2A rules, as EPI research has pointed to in various reports.<sup>13</sup>

But while funding for WHD is flat and may even decline due to Congress being unwilling to increase funding, as well as funding for other worker protection agencies like OSHA, the NLRB, and the EEOC, there's no question that the need for enforcement in H-2A is greater than ever. One piece of strong evidence comes from WHD's own enforcement data: A coauthor and I recently found that violations of H-2A rules account for much higher shares of back wages owed and civil money penalties (CMPs) assessed than violations of other worker protection laws on farms, and now account for an overwhelming share of the back wages owed and CMPs assessed in agriculture that are the result of closed investigations.<sup>14</sup>

**Table 1** below shows the shares of total back wages owed and CMPs assessed (combined) by type of legal violation for the 2000–2022 period. H-2A violations accounted for nearly half (46%) of all back wages owed to farmworkers and CMPs assessed over the 23-year period, but their share rose sharply during the two years of the Biden administration. As the table shows, WHD investigations during the Trump administration found that H-2A violations accounted for roughly half of the back wages and CMPs owed by farm employers during 2017–2020, but the H-2A share rose to 73%, almost three-fourths, during the Biden administration (2021–2022). As a result, WHD investigations that find H-2A violations now account for the vast majority of back wages owed and CMPs assessed.

Yet another one of the major flaws with the rules and enforcement regime governing the H-2A program, as USCIS has rightly pointed out in the NPRM, is that employers that violate the law—whether it be wage and hour, labor, health and safety, discrimination, or civil rights laws—are allowed to hire through the H-2A program. As numerous investigative

Table 1

## Violations of the H-2A visa program account for most of the back wages owed and civil money penalties assessed in agriculture

Share of total back wages owed and civil money penalties assessed by the Wage and Hour Division against agricultural employers, by type of legal violation, fiscal years 2000–2022

Fiscal Year	H-2A	MSPA	FLSA et al.
2000	8%	36%	54%
2001	24%	37%	36%
2002	12%	36%	49%
2003	19%	24%	55%
2004	11%	42%	41%
2005	27%	29%	42%
2006	11%	31%	56%
2007	11%	29%	58%
2008	31%	31%	37%
2009	27%	42%	30%
2010	17%	23%	59%
2011	33%	27%	37%
2012	52%	18%	30%
2013	70%	10%	20%
2014	41%	22%	36%
2015	59%	16%	25%
2016	44%	20%	36%
2017	49%	20%	30%
2018	47%	31%	22%
2019	42%	34%	23%
2020	52%	17%	30%
2021	73%	10%	17%
2022	73%	11%	16%
TOTALS	46%	22%	31%

**Note:** Values represent the share of total back wages and civil money penalties assessed by the Wage and Hour Division (WHD) in the U.S. Department of Labor in a given fiscal year, according to the three broad categories of laws listed by WHD. "H-2A" represents violations of the laws and regulations governing the H-2A visa program; "MSPA" represents the Migrant and Seasonal Agricultural Worker Protection Act (commonly referred to as MSPA), which is the major federal law that protects U.S. farmworkers, and "FLSA et al." represents the Fair Labor Standards Act (FLSA), which WHD data group with all other wage and hour laws that WHD enforces. FLSA is the U.S.' main worker protection law that

Table 1  
(cont.)

requires minimum wages and overtime pay and regulates the employment of workers younger than 18.

**Source:** Authors' analysis of U.S. Department of Labor, Wage and Hour Division, [Agriculture data table](#) (last accessed February 26, 2023).

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reports have shown, even some of the worst violators are allowed to keep hiring, even after they have been sanctioned for lawbreaking and extreme abuses of their workers.

For example, USCIS rightly cites a *BuzzFeed News* investigative report from 2015, titled “The Pushovers,” which reported on this, showing how even the worst employers can continue hiring H-2A and H-2B workers.<sup>15</sup> Just last month, a new investigation on H-2A shepherders by *High Country News* also reported on how some of the worst and most abusive violators of H-2A laws continue to be allowed to hire through the H-2A program. The report found that:

*“Despite the lack of resources, the WHD has managed to investigate some ranchers. According to the agency’s publicly available data, at least 80 sheep industry employers have violated their workers’ H-2A contracts in the past decade. But, like most abusive H-2A employers, the ranchers who committed these violations are almost always allowed to continue operating. An analysis of WHD and U.S. Citizenship and Immigration Services (USCIS) data found that about 80% of the sheep industry employers that investigators caught violating their workers’ rights in the past 10 years were allowed to continue bringing H-2A workers into the country.”<sup>16</sup>*

In addition, farm employers that are repeat violators—in terms of both H-2A rules but also the other major workplace laws that cover farmworkers (MSPA and FLSA)—are in fact quite common, as we found in our report from 2020, which analyzed WHD enforcement data.<sup>17</sup>

Another enforcement problem that was recently identified is that even when WHD detects and can confirm employer violations, as a recent report from *Bloomberg Law* revealed, it “cannot litigate every case due to resource issues.”<sup>18</sup> The report pointed specifically to an H-2B case where this occurred. When it comes to health and safety violations, new reporting just published by *ProPublica* suggests that workers are unwilling to come forward to report employer violations because of a perception that OSHA doesn’t have the resources to investigate small farms.<sup>19</sup> These realities and perceptions further embolden lawbreaking employers.

A report I authored in 2022 also presented evidence of rampant wage theft in the major H-2B industries.<sup>20</sup> Data from 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, there were 225,227 cases investigated by WHD in the seven major H-2B industries, and violations were found in 180,451 of those cases, or 80%. 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. That means that like H-2A workers, H-2B workers are being recruited into

industries where they will be vulnerable to wage theft and other forms of employer lawbreaking and exploitation.

Considering the stagnant and even possibly declining funding for WHD staffing, operations, and litigation, despite it being the primary agency tasked with protecting H-2 workers, as well as for other worker protection agencies like OSHA, the NLRB, and the EEOC—and little chance that Congress will reverse this trend in the near or medium term—as well as the increasing share of H-2A violations on farms, the prevalence of repeat violators in agriculture, and rampant workplace violations occurring in H-2B industries—USCIS should cooperate with DOL to create a front-end screening process to prohibit employers from hiring through the H-2 programs if they have a track record of violating wage and hour and labor laws. This mechanism could make a significant impact by keeping bad employers out of the H-2 programs and lessen the burden on WHD's investigators.

Given the high prevalence of wage and hour violations and other extreme forms of exploitation taking place on farms and in H-2B industries, as discussed above, there is a strong case for this. To make it a reality, DOL should 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 any labor, employment, wage and hour, civil rights, disability, anti-trafficking or anti-discrimination laws should be prohibited from hiring H-2 workers. Given the present and likely future reality that WHD and other worker protection agencies will continue to be vastly underfunded and understaffed,<sup>21</sup> such a screening process on the front end of the H-2 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 should also be adopted for the H-1B program at the labor condition application stage).

At the petition level, even absent a new screening process at the DOL level, USCIS should, at a minimum, build on proposed section 8 C.F.R. 214.2(h)(10)(iii)(B) by creating a list of key labor, employment, wage and hour, civil rights, disability, anti-trafficking, and anti-discrimination laws, the violation of which would establish strong evidence that an employer does not treat their employees well and is unlikely to follow employment and immigration laws with respect to their H-2 employees. Although this would work best in tandem with a front-end screening process, USCIS could make significant progress in keeping lawbreaking employers out of the H-2 programs by mandating that any employer that has violated any of the listed laws will be prohibited from having a petition approved for hiring H-2 workers.

Another option for a possible model that could be adapted by USCIS, DOL, or ideally, managed jointly by DOL and USCIS, is currently operated by USCIS, namely, their Electronic Registration Process for employers hiring through the H-1B program for specialty occupations. 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.”<sup>22</sup> 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.”<sup>23</sup>

While the H-1B Electronic Registration Process is mainly designed to streamline processes for employers and manage the H-1B numerical cap, the model could be adapted by DOL and USCIS as part of the application process at the labor certification stage and/or petition 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-2 workers (as is already done via the DOL temporary labor certification forms). As part of that new process, employers could be required to attest, under penalty of perjury and of being banned from hiring through the H-2 programs, that they have not been found to have violated any of the listed labor, employment, wage and hour, civil rights, disability, anti-trafficking, 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 could cooperate with other worker protection agencies like the NLRB and EEOC—and ultimately certify employers that have not violated the applicable laws. Employers that are certified by DOL could then continue on with the labor certification process.

If implemented solely at the petition level, USCIS could create such a registration process and use it for two purposes: First, as just described, to assess and certify whether employers are eligible to hire through H-2 based on their past legal violations, but also to manage the numerical cap count for H-2B employers, as it does in the H-1B program. Since the H-2B program is always oversubscribed, it could be a useful tool that benefits employers by allowing them to be better informed about where their petitions stand vis-à-vis the annual cap, but it would also benefit workers by allowing USCIS to prohibit lawbreaking employers from participating in the H-2 programs.

## **H-2 WORKERS AND ACQUIRING PERMANENT RESIDENCE**

In the NPRM, DHS makes an important proposal at proposed 8 CFR 214.2(h)(16)(ii), to increase flexibility for H-2 workers and employers by clarifying that an H-2 worker may take steps toward becoming a lawful permanent resident while still maintaining lawful nonimmigrant status. EPI strongly supports DHS’s proposal to increase the ability of H-2 workers to adjust their status to become lawful permanent residents. This is discussed in the Migration that Works comment, but I wish to add additional context and support here.

### **Very few H-2 workers ever obtain lawful permanent resident status through the Employment-Based green card pathway**

Relatively few migrant workers who lack college degrees are able to arrive in the United States with green cards to fill low-wage jobs. The nearly 500,000 who work in the United



States now through the H-2 programs cannot reasonably expect that someday they will obtain lawful permanent resident (LPR) status and eventually become naturalized citizens. Most instead can only work in the United States temporarily through the H-2 nonimmigrant work visa programs.

This is, first and foremost, an issue that Congress must address, because there are insufficient pathways for workers in low-wage jobs. Under the five Employment-Based (EB) green card preferences, 140,000 EB green cards are available each year for EB-1 through EB-5, with 40,040 or 28.6% of the overall EB total available for EB-3, which is for skilled workers with at least two years of professional experience, professionals with jobs that require at least a baccalaureate degree, and “unskilled workers.” 10,000 EB visas are set aside for the unskilled workers portion of EB-3, which is for migrant workers coming to fill year-round (non-seasonal) jobs that do not require a college degree,<sup>24</sup> and which is often referred to as the EB-3 Other Workers category or “EB-3 OW.” EB-3 OW is the only employment-based preference category for migrant workers without college degrees to come to the United States to fill jobs with a green card in hand and be on a path to citizenship.

For many years, the number of available visas under the EB-3 OW category has been even fewer than the full 10,000 allotted in the statute since the late 1990s as the result of being reduced temporarily to 5,000 by the Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA).<sup>25</sup> Congress did this in order to offset the number of green cards issued to NACARA beneficiaries. The 50% reduction was still in place until recently despite the fact that very few EB-3 OW green cards have been issued in recent years to NACARA beneficiaries. This is because hundreds of thousands were issued in previous years and are still being counted against the EB-3 OW cap until the totals have balanced.<sup>26</sup> For 2022 the State Department announced that the NACARA reduction would be set at 150<sup>27</sup> and then set the 2023 reduction at 167.<sup>28</sup> While the number of available EB-3 OW green cards has now almost returned to normal, the cap of nearly 10,000 represents about 2% of the total number of H-2 workers who worked in the United States in the past fiscal year.

The problem is not, however, just the number of available green cards. While there are likely many employers who would like to apply to hire H-2 workers for different, permanent positions with green cards, the reality is that DHS’s interpretation of the statute with respect to nonimmigrant intent has acted as a deterrent to employers who would otherwise be willing to do so. The limited available data that are available support the assertion that employers are not seeking to obtain many green cards for H-2 workers, and show that very few H-2 workers will ever obtain lawful permanent residence through the EB green card pathway.

One source of data is DOL’s Program Electronic Management Review (PERM) system for permanent labor certification. This is where employers take the first step in attempting to hire a migrant worker with an EB green card. In order to move on to the next step, DOL must certify the employer’s need. The PERM data contain the current visa status of workers that employers are hoping to hire. Out of 102,286 total approvals for permanent labor certification that were processed by DOL in 2023,<sup>29</sup> only 989 of the approved

certifications were for workers who were in H-2A or H-2B status.<sup>30</sup> That means that only about 1% of total approved certifications by employers for employment-based green cards were for H-2 workers.

And in fact, as the PERM numbers would suggest, very few H-2 workers eventually get EB green cards. According to data I've reviewed that was originally obtained by a Freedom of Information Act request, based on data from USCIS Form I-485, only 568 H-2 workers obtained EB green cards between the five fiscal years of 2010 to 2014, or roughly 114 per year.

## **EPI supports the proposal to clarify that an H-2 worker may take steps toward becoming a lawful permanent resident while still maintaining lawful nonimmigrant status, but urges USCIS to clarify that this flexibility is available to workers seeking adjustment to LPR status in either employment-based or family-based preference categories**

There is an increasing number of H-2 workers employed in the United States, with the total number now approaching 500,000, similar to the Bracero Program at its peak. Many of those half a million workers have significant experience working in the United States, have made important contributions to the country, and should be allowed a chance to remain permanently, bring their families, and integrate fully into the United States. DHS's proposed revisions at to be codified at 8 C.F.R. § 214.2(h)(16)(ii) that allow H-2 workers to pursue lawful permanent resident status while still maintaining their H-2 status—giving them the practical ability to pursue permanent opportunities without automatically losing their nonimmigrant status—will be beneficial to those workers, as well as their employers.

While the fact remains that there will continue to be very few Employment-Based green cards available for H-2 workers, this change will tilt the balance towards worker power—giving H-2 workers one additional pathway to remain permanently in the United States, however limited—instead of being relegated to being 'permanently temporary' in a nonimmigrant status, year after year.

Another important pathway that H-2 workers may have that would allow them to adjust to LPR status is as the beneficiary of a Family-Based (FB) petition. In fact, in many cases, if an H-2 worker has a qualifying family member, the FB pathway may be more feasible for H-2 workers than the EB pathway, given the numerical caps in the EB-3 OW category. However, the language in the NPRM does not seem to address H-2 workers who could benefit from an FB petition. I therefore urge DHS to clarify and state explicitly at 8 C.F.R. § 214.2(h)(16)(ii) or an accompanying section, that this new proposed flexibility will apply to workers seeking LPR status through both the Employment-Based and Family-Based

preference categories.

Thank you again to DHS for considering these comments and recommendations. EPI looks forward to the administration quickly issuing and implementing the final rule, along with the improvements suggested here and in the comment submitted by the Migration that Works coalition, as well as any and all other regulatory and subregulatory improvements that the administration can make to protect workers and improve labor standards in all U.S. temporary work visa programs.

Best regards,  
Daniel Costa  
Director of Immigration Law and Policy Research  
Economic Policy Institute

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1. See Tables 4 and 7 respectively at 65080 and 65087.
2. “The total number of aliens who may be issued visas or otherwise provided nonimmigrant status during any fiscal year (beginning with fiscal year 1992)... under section 101(a)(15)(H)(ii)(b) may not exceed 66,000...” See [Immigration Act of 1990](#), Section 205(g)(1)(B).
3. The USCIS *Characteristics of H-2B Nonagricultural Temporary Workers* reports are available at USCIS’s [“Reports and Studies”](#) web page.
4. The latter applies to certain Canadian and Bermudian citizens, Bahamian nationals, and British subjects residing on 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. For more background, see discussion in USCIS, U.S. Department of Homeland Security, *Characteristics of H-2B Nonagricultural Temporary Workers, Fiscal Year 2021 Report to Congress*, March 10, 2022 (p. 3).
5. USCIS, [H-2B Employer Data Hub Glossary](#), last updated February 14, 2022.
6. The *Characteristics* numbers are adjusted in Figure A as needed to account for discrepancies with the State Department data: Where there was a discrepancy between the number of visas issued by the State Department as reported in the *Characteristics* reports and the State Department data published on State’s Nonimmigrant Visa Statistics page, I use the State Department’s data; these discrepancies are small and are likely attributable to slight changes in the count between the time when USCIS obtains the data from State and the time State makes the final data public.
7. Department of Homeland Security and the Employment and Training Administration, *Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2023 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers*, Temporary Rule, RIN: 1205-AC14 and 1615-AC82, 87 Fed. Reg. 76816 (December 15, 2022).
8. See discussion in the NPRM at 88 Fed. Reg. 65067.

9. For example, see discussion in Migration that Works, “MTW’s Recommendations to DHS Towards Ensuring Mobility for H2 Workers,” Statement, May 17, 2022.
10. Proposed 8 C.F.R. 214.2(h)(10)(iii)(B); 88 Fed. Reg. 65059.
11. Daniel Costa and Philip Martin, *Record-low number of federal wage and hour investigations of farms in 2022: Congress must increase funding for labor standards enforcement to protect farmworkers*, Economic Policy Institute, August 22, 2023.
12. 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 2020.
13. See for example, Daniel Costa and Philip Martin, *Record-low number of federal wage and hour investigations of farms in 2022: Congress must increase funding for labor standards enforcement to protect farmworkers*, Economic Policy Institute, August 22, 2023.
14. Daniel Costa and Philip Martin, *Record-low number of federal wage and hour investigations of farms in 2022: Congress must increase funding for labor standards enforcement to protect farmworkers*, Economic Policy Institute, August 22, 2023.
15. 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, 2023.
16. Teresa Cotsirilos, “The dark side of America’s sheep industry: Shepherders face wage theft, isolation, hunger and alleged abuse.” *High Country News*, October 2, 2023.
17. 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 2020.
18. Rebecca Rainey, “Inadequate Labor Department Resources Stymie Enforcement Efforts,” *Bloomberg Law*, November 7, 2023.
19. Melissa Sanchez and Maryam Jameel “OSHA Investigates Small Dairy Farms So Rarely That Many Worker Advocates Don’t Bother to Report Deaths and Injuries,” *ProPublica*, November 13, 2023.
20. Daniel Costa, *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*, Economic Policy Institute, August 18, 2022.
21. See for example, Daniel Costa and Philip Martin, *Record-low number of federal wage and hour investigations of farms in 2022: Congress must increase funding for labor*

*standards enforcement to protect farmworkers*, Economic Policy Institute, August 22, 2023; 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.

22. USCIS, “**H-1B Electronic Registration Process**,” U.S. Department of Homeland Security.

23. USCIS, “**H-1B Electronic Registration Process**,” U.S. Department of Homeland Security.

24. 8 U.S.C. § 1153(b)(3)(A)(iii). See USCIS, “**Employment-Based Immigration: Third Preference EB-3**,” last updated on December 2, 2020.

25. The reduction of EB-3 OW visas by 5,000 per year will remain in place until all of the adjustments under NACARA have been offset. See NACARA, P.L. 105-100 (1997).

26. See discussion in William Kandel, Jill Wilson, and Sarah Donovan, “**U.S. Employment-Based Immigration Policy**,” Congressional Research Service, R47164, July 21, 2022. Also citing unpublished data shared with the author from the Congressional Research Service (July 7, 2019).

27. See discussion in William Kandel, Jill Wilson, and Sarah Donovan, “**U.S. Employment-Based Immigration Policy**,” Congressional Research Service, R47164, July 21, 2022.

28. See U.S. Department of State, at starred footnote in section “A. FINAL ACTION DATES FOR EMPLOYMENT-BASED PREFERENCE CASES,” in **Visa Bulletin for September 2023**, Number 81, Volume X.

29. Office of Foreign Labor Certification, **Permanent Employment Program – Selected Statistics, Fiscal Year (FY) 2023**, Employment and Training Administration, U.S. Department of Labor.

30. There were also 90 withdrawn applications. See PERM disclosure file (in Excel) for Fiscal Year 2023 at Office of Foreign Labor Certification, **Performance Data**, Employment and Training Administration, U.S. Department of Labor.