



Options for Reforming the H-2B Visa Program and Improving Late Season Employers' Access to Workers

June 7, 2019

Fiscal Year 2018 Report to Congress



**Homeland
Security**

Under Secretary for Management

Message from the Office of the Under Secretary for Management

June 7, 2019

I am pleased to present the following report, “Options for Reforming the H-2B Visa Program and Improving Late Season Employers’ Access to Workers,” which has been prepared by U.S. Citizenship and Immigration Services (USCIS), in consultation with the U.S. Department of Labor (DOL).



This report was compiled pursuant to language set forth in the Joint Explanatory Statement, which accompanies the Fiscal Year 2018 Department of Homeland Security (DHS) Appropriations Act (P.L. 115-141). This report describes potential options to reform the program and to address the problem of the unavailability of H-2B visas for U.S. employers that need temporary workers to begin work late in a semiannual period of availability.

Pursuant to congressional requirements, this report is being provided to the following Members of Congress:

The Honorable Lucille Roybal-Allard
Chairwoman, House Appropriations Subcommittee on Homeland Security

The Honorable Chuck Fleischmann
Ranking Member, House Appropriations Subcommittee on Homeland Security

The Honorable Shelly Moore Capito
Chairman, Senate Appropriations Subcommittee on Homeland Security

The Honorable Jon Tester
Ranking Member, Senate Appropriations Subcommittee on Homeland Security

Inquiries relating to this report may be directed to me at (202) 447-3400.

Sincerely,

A handwritten signature in blue ink that reads "R. D. Alles".

R. D. Alles
Senior Official Performing Duties of the
Deputy Under Secretary for Management

Executive Summary

This report provides the information requested by the House and Senate Appropriations Subcommittees on Homeland Security by describing options that generally are phrased in terms of actions that Congress or the Departments could take to improve late season employers' access to H-2B workers. The report also provides additional options for improving the overall H-2B program. Such references should not be construed as expressing an opinion on the scope of DHS's or DOL's current statutory or regulatory authorities.

As requested, the report provides options to improve visa availability under the existing annual cap of 66,000 workers for employers that need workers to start work late in a semiannual period of the fiscal year. These options include:

- Creating a merit-based standard for H-2B eligibility to ensure that the limited H-2B visa numbers are reserved for employers or industries that truly need H-2B workers and have demonstrated a significant contribution to the U.S. economy in an area where H-2B workers are needed.
- Designating a list of industries or occupations eligible for H-2B workers, based on Congress's determination that certain industries' hiring of H-2B workers would have the greatest net positive impact on the American economy.
- Designating cap numbers for individual industries that are significant to the national interest and giving those petitioners preferential access to cap-subject H-2B visas.
- Requiring employers to name all beneficiaries on H-2B petitions to prevent employers from being able to "pad" petitions with unnamed workers.
- Creating a statutory definition of the phrase "temporary service or labor" to ensure that employers are using the H-2B visa program properly to meet legitimate temporary need.
- Distributing cap numbers evenly on a quarterly basis (16,500 new H-2B visa numbers per quarter).

In addition, USCIS includes additional options to improve the H-2B visa program overall and enhance the integrity of the immigration system. These options include:

- Requiring that all H-2B employers be enrolled in and use E-Verify, which would promote the integrity of the immigration system and ensure that H-2B visas are restricted to only those employers that have demonstrated good business/corporate citizenship.
- Creating meaningful financial penalties for H-2B petitioners who fail to comply with the reporting requirements and allowing H-2B workers to self-report to USCIS if they leave a worksite early, depart the United States, change employers, or obtain a different nonimmigrant or immigrant status, and, if applicable, provide the reasons for such early departure from the worksite.
- Mandating a DOL website registry to advertise all prospective H-2B jobs to U.S. workers nationwide, including U.S. territories.
- Considering the elimination of the use of, or increased oversight over, recruitment agents in the process of hiring H-2B workers.

- Increasing the H-2B Fraud Detection and Prevention Fee to match the current Fraud Detection and Prevention Fee paid by H-1B petitioners (\$500).
- By statute, prohibiting H-2B workers from being charged certain fees such as transportation, filing, or visa fees associated with the filing of an H-2B petition, and reinforcing the prohibition on charging workers recruitment or job placement fees.
- Prohibiting H-2B employers from hiring J-1 exchange visitor program workers.
- Codifying DHS's authority to publish an annual list of eligible countries that may participate in the H-2A and H-2B programs.
- Providing the Secretary of Labor with the statutory authority to establish application fees for employers to process temporary labor certifications and clarifying that H-2B petitioners cannot pass the cost of these fees onto H-2B workers.
- Removing existing riders concerning corresponding employment, the three-fourths guarantee, and prevailing wages for the H-2B program contained in P.L. 115-245 with a 90-day transition period.



Options for Reforming the H-2B Visa Program and Improving Late Season Employers’ Access to Workers

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I. Legislative Language

This document responds to the reporting requirements set forth in the Joint Explanatory Statement accompanying the Fiscal Year (FY) 2018 Department of Homeland Security (DHS) Appropriations Act (P.L. 115-141).

The Joint Explanatory Statement states:

The Department, in consultation with the Department of Labor, is directed to review options for addressing the problem of unavailability of H-2B visas for employers that need workers to start work late in a semiannual period of availability and to report to the Committees on these options not later than 120 days after the date of the enactment of this Act.

II. Background

Overview of the H-2B Program

The H-2B program allows U.S. employers to bring foreign workers to the United States to fill temporary nonagricultural jobs. *See* Immigration and Nationality Act (INA) § 101(a)(15)(H)(ii)(b), 8 U.S.C. § 1101(a)(15)(H)(ii)(b). To petition successfully for this nonimmigrant classification, the employer must establish that:

- Its need for the prospective worker’s labor or services is temporary in nature—that is, based on a one-time occurrence, a seasonal need, a peakload need, or an intermittent need;
- Qualified workers in the United States are not available to perform the temporary work; and
- The employment of the H-2B nonimmigrant worker will not affect adversely the wages and working conditions of similarly employed U.S. workers.¹

Generally, before filing a petition with USCIS for H-2B workers, the employer must obtain a valid temporary labor certification (TLC) from the Department of Labor (DOL) or, if the worker(s) will be employed on Guam, from the Governor of Guam. *See* 8 C.F.R. § 214.2(h)(6)(iii)(A) and (C). Notably, H-2B petitions may request multiple workers if the workers will be performing the same service, for the same period of time, and in the same location. *See* 8 C.F.R. § 214.2(h)(2)(ii). An H-2B worker also must be from a country included on the list of “Eligible Countries,” as designated by DHS in a notice published at least annually in the Federal Register, unless it is determined to be in the U.S. interest that a foreign worker from a country not on this list be granted H-2B status. *See* 8 C.F.R. § 214.2(h)(6)(i)(E). In addition, petitioners and any agent, facilitator, recruiter, or similar employment service (whether or not located in the United States) are prohibited from collecting a wide variety of fees, or requiring compensation, from H-2B workers as a condition of a job offer or employment. *See* 8 C.F.R. § 214.2(h)(6)(i)(B); 20 C.F.R. §§ 655.20(o), (p).

H-2B Cap

The Immigration Act of 1990 set the number of workers who may be granted H-2B classification in a fiscal year (the H-2B “cap”) at no more than 66,000. *See* INA § 214(g)(1)(B), 8 U.S.C. § 1184(g)(1)(B). Subsequently, Section 405 of the REAL ID Act of 2005 mandated that the H-2B cap be allocated semiannually, allowing for up to 33,000 H-2B workers in the first half of the fiscal year (October 1 – March 31), and for the remaining H-2B visas to be allocated to workers during the second half of the fiscal year (April 1 – September 30). *See* INA § 214(g)(10), 8 U.S.C. § 1184(g)(10). In FYs 2005, 2006, 2007, and again in 2016, Congress passed

¹ *See* 8 C.F.R. §§ 214.2(h)(6)(ii)(B), (iv)(A).

“returning worker” exemptions to the H-2B visa cap, valid for the relevant fiscal year only. These exemptions allowed workers who were counted against the H-2B cap in one of the 3 preceding fiscal years not to be counted against the relevant fiscal year cap.² This provision significantly increased the total number of H-2B workers who were employed in the United States in FYs 2006 and 2007, but only modestly so in FYs 2005 and 2016.³

In May 2017, Congress enacted the FY 2017 DHS Appropriations Act (P.L. 115-31), which authorized “the Secretary of Homeland Security, after consultation with the Secretary of Labor, and upon the determination that the needs of American businesses cannot be satisfied in 2017 with U.S. workers who are willing, qualified, and able to perform temporary nonagricultural labor” to increase the number of temporary nonagricultural work visas available to U.S. employers above the statutory cap for the remainder of the fiscal year (i.e., through September 30, 2017). Following the required consultation, DHS, in accordance with the authority granted by P.L. 115-31, raised the numerical limitation on H-2B nonimmigrant visas by up to an additional 15,000 for the remainder of FY 2017 for American businesses that could attest to a level of need such that if they did not receive all workers whom they requested under the cap increase, they were likely to suffer irreparable harm (i.e., suffer a permanent and severe financial loss). DHS and DOL jointly published a temporary final rule on July 19, 2017, relying on good cause to forego notice and comment rulemaking under the Administrative Procedure Act. A total of 12,294 H-2B workers were approved for H-2B classification under petitions filed pursuant to the FY 2017 supplemental cap increase.

For the second half of FY 2018, because of the high demand of H-2B applications filed on January 1, 2018, for an April 1, 2018, work start date, DOL announced via a Federal Register notice that it would hold H-2B TLC applications filed on January 1, 2018, until February 20, 2018, and that the release of these certifications would be in sequential order based on the application receipt date and time.⁴ As a result of this announcement, USCIS anticipated receiving enough H-2B petitions to exceed the number of available visas in a short period of time.⁵ On March 1, 2018, USCIS announced that it had received a sufficient number of petitions to reach the congressionally mandated H-2B cap for FY 2018. During the first 5 business days that petitions could be filed, USCIS received approximately 2,700 H-2B cap-subject petitions requesting approximately 47,000 workers, which is more than the number of H-2B visas that

² See INA § 214(g)(9)(a), 8 U.S.C. § 1184(g)(9)(a), as revised by the FY 2016 DHS Appropriations Act (P.L. 114-113).

³ For additional information on historical H-2B program use see <https://www.uscis.gov/tools/reports-studies/reports-and-studies>.

⁴ DOL received close to 4,500 H-2B applications for 81,008 workers on January 1, 2018, for an April 1, 2018, start date, compared to 1,548 applications for 26,673 workers on January 1, 2017, for an April 1, 2017, work start date. See Notice, *Labor Certification Process for the Temporary Employment of Aliens in Non-Agricultural Employment in the United States*, 83 FR 3189, 3190 (Jan. 23, 2018).

⁵ See <https://www.uscis.gov/news/alerts/surge-h-2b-petitions-possible-second-half-fy-2018>.

were available. In accordance with DHS regulations,⁶ this high volume of requests required the Department to use a computer-generated process to select randomly which petitions would be considered, commonly known as a lottery. This marked the first time that it was necessary to use a lottery to select H-2B petitions subject to the cap during the second half of a fiscal year.⁷

On March 23, 2018, the President signed the FY 2018 DHS Appropriations Act (P.L. 115-141). Section 205 contained a provision materially identical to Section 543 of the FY 2017 DHS Appropriations Act to allow the Secretary of Homeland Security, after consultation with the Secretary of Labor, to increase the total number of aliens who could receive an H-2B visa in FY 2018 by not more than the highest number of H-2B nonimmigrants who participated in the H-2B returning worker program in any fiscal year in which returning workers were exempt from the H-2B numerical limitation.

On May 31, 2018, DHS and DOL published a joint temporary final rule announcing the availability of up to an additional 15,000 H-2B nonimmigrant visas beyond the statutory cap through the end of FY 2018. As with the supplemental allocation in FY 2017, these visas were available only to American businesses that attest that they likely will suffer irreparable harm without the ability to employ all the H-2B workers requested in their petition in FY 2018. In a press release announcing the publication of the temporary final rule making the additional visas available, DHS Secretary Nielsen stated, “The limitations on H-2B visas were originally meant to protect American workers, but when we enter a situation where the program unintentionally harms American businesses it needs to be reformed. I call on Congress to pass much needed reforms of the program and to expressly set the number of H-2B visas in statute. We are once again in a situation where Congress has passed the buck and turned a decision over to DHS that would be better situated with Congress, who knows the needs of the program. As Secretary, I remain committed to protecting U.S. workers and strengthening the integrity of our lawful immigration system and look forward to working with Congress to do so.”⁸

On June 6, 2018, USCIS announced that in the first 5 business days of filing, it received petitions for more beneficiaries than the 15,000 H-2B visas made available under the FY 2018 supplemental cap. Approximately 1,800 petitions for 29,000 beneficiaries were received by USCIS by June 6, 2018. Accordingly, USCIS once again was required by regulation to use a lottery to select randomly enough petitions to meet, but not to exceed, the increased cap for

⁶ See 8 C.F.R. § 214.2(h)(8)(ii)(B). This provision was promulgated in May 2005 and has been used in the H-1B program in most years since promulgation. See 70 FR 23775. The reasons for creating the lottery system were discussed in the preamble to the interim rule establishing the random selection process. As explained in the preamble, USCIS created the lottery system in order to ensure fairness among petitioners whose petitions were received on the final receipt date.

⁷ Although the random selection process typically has been applied only in the H-1B program, the preamble to the interim final rule implementing the 5-day filing period rule makes it clear that “[t]he procedures at 8 C.F.R. § 214.2(h)(8)(ii)(B) for assigning cap numbers also apply to other H nonimmigrant petitions that are subject to numerical limitations,” 73 Fed. Reg. 57, 15390 (March 24, 2008).

⁸ See DHS Press Release, “DHS Announces Additional Visas for Foreign Workers to Assist American Businesses at Risk of Failing” (May 31, 2018), <https://www.dhs.gov/news/2018/05/31/dhs-announces-additional-visas-foreign-workers-assist-american-businesses-risk>.

FY 2018.⁹ The lottery included all H-2B cap-subject petitions received between May 31, 2018, and June 6, 2018. USCIS rejected and returned all unselected petitions, as well as any cap-subject petitions received after June 6, together with associated filing fees.

Exemptions from the H-2B Cap

Generally, a worker whose stay in H-2B status is extended will not be counted against the H-2B cap again. Additionally, the following workers are exempt from the H-2B cap:

1. H-2B workers in the United States or abroad who previously have been counted toward the cap in the same fiscal year;
2. Fish roe processors, fish roe technicians, and supervisors of fish roe processing;¹⁰ and
3. From November 28, 2009, until December 31, 2029, workers performing temporary labor or services in the Commonwealth of the Northern Mariana Islands or Guam.¹¹

Spouses and children of H-2B workers fall under a separate visa classification (H-4), are not counted against the H-2B cap, and are not authorized to work in the United States incident to their H-4 status. *See* INA § 214(g)(2), 8 U.S.C. § 1184(g)(2); 8 C.F.R. § 214.2(h)(8)(ii)(A). Once the H-2B cap is reached, USCIS may accept petitions only for H-2B workers who are cap-exempt.

⁹ *See* 8 C.F.R. § 214.2(h)(8)(ii)(B), <https://www.uscis.gov/news/alerts/uscis-completes-lottery-temporary-increase-fy-2018-h-2b-cap>.

¹⁰ *See* P.L. 108-287 § 14006, 118 Stat. 951, 1014 (2004).

¹¹ *See* 48 U.S.C. § 1806(a)(2) as amended by Section 3 of P.L. 115-218; 48 U.S.C. § 1806(b).

III. Discussion of Options to Reform the H-2B Visa Program

A. Options for Late Season Filers

Below is a discussion of potential reforms that may address the problem of unavailability of H-2B visas for employers that need workers to start work late in a semiannual period of availability. Further, improving the integrity of the program, such as excluding unscrupulous employers or employers who are abusing the program, would make more H-2B visa numbers available to employers who are more likely to comply with the program's intent and requirements. This report responds to a congressional request by describing options that generally are phrased in terms of actions that Congress or the Departments could take to address the problem of unavailability of H-2B visas for employers that need workers to start work late in a semiannual period of availability. Such references should not be construed as expressing an opinion on the scope of DHS's or DOL's current statutory or regulatory authorities.

Option 1 – Create a merit-based standard for H-2B eligibility

Congress could require that H-2B petitioners establish the relative merit of their business activity or industry by creating a points-based system based on activity, industry, and/or contributions of the workers to the United States. Currently, employers may request H-2B workers on the basis of the unavailability of U.S. workers who are able, willing, and qualified to perform the needed temporary job. In addition to keeping that standard, and to ensure that only the most deserving petitioners receive the limited number of H-2B visas available, Congress could establish a points system to ensure that the limited H-2B visa numbers are reserved for employers or industries that truly need H-2B workers and have demonstrated a significant contribution to the U.S. economy in an area where H-2B workers are needed. The points system, for example, could give credit to employers that demonstrate that the work to be done in the occupational classification would affect the U.S. economy significantly. An employer also might be able to demonstrate the merit of its activity/business and gain points by showing that its business is providing a positive economic impact in an economically distressed geographic area; an “H-2B dependent” employer, which would need to be defined in statute, that has a higher proportion of H-2B workers employed in the occupational classification compared to U.S. workers, may receive fewer points.¹²

¹² The concept of a “dependent” employer currently exists within in the H-1B nonimmigrant visa program. Under Section 212(n) of the INA, as amended by the American Competitiveness and Workforce Improvement Act of 1998, P.L. 105-277, div. C, tit. IV, additional obligations attach to certain employers that employ a high proportion of H-1B workers (H-1B dependent employers), including obligations relating to nondisplacement and recruitment of U.S. workers.

Option 2 – Designate a list of industries or occupations eligible for H-2B visas

Congress could designate only certain industries or occupations as eligible to receive H-2B visas. Currently, employers may request H-2B workers on the basis of the unavailability of the U.S. workers who are able, willing, and qualified to perform the needed temporary job. In addition to keeping that standard, however, Congress could designate certain industries or occupations in which the use of H-2B visas would have the greatest net positive impact on the American economy. A similar system for skilled occupations already exists in Australia.¹³ Congress also could define which “seasonal” occupations are eligible for H-2B classifications, or create an entirely new standard for determining which industries or occupations may participate in the program. If Congress does not set the parameters in statute, which would be more predictable and efficient for petitioners, Congress could require that DHS annually update a list of eligible industries or occupations for H-2B visas on the basis of prescribed economic indicators such as overall unemployment rates within an industry.

Option 3 – Designate cap numbers for individual industries

Congress could designate H-2B cap numbers per industry. Currently, employers may request H-2B workers on the basis of the unavailability of U.S. workers who are able, willing, and qualified to perform the needed temporary job, and the overall cap of 66,000 is divided semiannually. In addition to keeping that standard, however, Congress could designate cap numbers for the industries that would produce the greatest net positive impact on the American economy if aided by H-2B workers. For example, Congress could determine that there is a need for seasonal workers in specified industries that are significant to the national interest and give those petitioners preferential access to cap-subject H-2B visas. In the alternative, Congress could create a standard for designating the cap number for industries. For example, Congress could require that a list of cap numbers for specific industries be updated each year on the basis of prescribed economic indicators such as overall unemployment rates within an industry. Such a system already exists in Australia.¹⁴

Option 4 – Require employers to name all beneficiaries on H-2B petitions

Congress could mandate the assignment of visa numbers to only H-2B petitions that name all beneficiaries. Currently, employers may “pad” petitions with unnamed workers, which can hurt small businesses and takes limited H-2B visa numbers from employers that need workers later in the season. Requiring an employer to name each H-2B worker on every petition may allow more visas to be available for late season filers because employers would not be able to “pad”

¹³ Australia’s Department of Jobs and Small Business publishes a list of eligible skilled occupations and occupational ceilings for which employers may seek foreign workers for either temporary or permanent positions. The list takes into consideration Australian economic needs and regional skill shortages. The current list of eligible skilled occupations includes occupations such as dairy farmers, foresters, bricklayers, cattle farmers, gardeners, and greenkeepers. See <https://www.homeaffairs.gov.au/trav/work/work/skills-assessment-and-assessing-authorities/skilled-occupations-lists/combined-stsol-mltssl> and <https://www.homeaffairs.gov.au/trav/work/work/skills-assessment-and-assessing-authorities/skilled-occupations-lists>.

¹⁴ *Id.*

petitions. USCIS already precludes H-2B petitioners from “padding” petitions for nationals from countries not included on the H-2B countries list by requiring that petitioners specifically name such beneficiaries. This current practice could be expanded to all H-2B petitions. This reform also would enhance the program’s integrity by allowing DHS to vet and monitor better all H-2B workers.

Option 5 – Create a statutory definition of the phrase “temporary service or labor”

The INA does not define the term “temporary service or labor.” For purposes of the H-2B visa program, USCIS defines “temporary need” generally as a period of 1 year or less for seasonal, peakload, or intermittent need, or in the case of a one-time occurrence, a period of up to 3 years. Congress specifically could define by statute for H-2B petitions the meaning of “temporary service or labor” as a maximum period of time, for example, 6 or 8 months, excluding one-time occurrences. By creating this definition, Congress could ensure better that employers are using the H-2B visa program properly to meet legitimate temporary need. In addition, limiting the duration period for temporary need may lessen demand and provide late season filers, such as summer employers, a better chance at receiving H-2B visas under the cap. However, it is possible that some employers may submit more petitions because they will be requesting more distinct positions with shorter durations, thereby increasing competition for cap numbers.

Option 6 – Distribute cap numbers on a quarterly basis

Congress could direct that the cap be split evenly into quarters and that 16,500 new H-2B visa numbers be allocated per fiscal quarter. Unused cap numbers from one quarter could be made available during a later quarter of the same fiscal year. Under current regulations at 8 C.F.R. § 214.2(h)(8)(ii), and to ensure fairness under any new regulatory scheme, USCIS likely would be required to implement a lottery if USCIS receives petitions requesting more than 16,500 H-2B visas during the first 5 business days during which any new quarter’s petitions could be filed.

Although this option may not correct the full scope of inequities for employers with late season needs, it may allow employers in some late season industries that historically have been unable to do so to obtain visas. However, any change that increases the likelihood of a lottery may increase rather than decrease uncertainty for businesses that rely on the H-2B program because of the speculative nature of the random selection.

B. Additional Options to Improve the H-2B Visa Program

Below is a discussion of additional options to improve the H-2B visa program overall and enhance the integrity of the immigration system.

Option 1 – Require that all employers filing H-2B petitions be enrolled in and use E-Verify

Congress could mandate that all employers filing H-2B petitions be enrolled in and use E-Verify to verify electronically the eligibility of new hires to work lawfully in the United States. Originally a recommendation from the 1994 Jordan Commission on Immigration Reform,

employers participating in E-Verify generally are able to confirm the employment eligibility of newly hired employees immediately. The system is free, easy to use, and efficient. This option would ensure better that unauthorized workers are not hired in the United States by employers of H-2B workers and would promote the integrity of the immigration system. It also would ensure that H-2B visas are restricted to only more reliable employers that have demonstrated good business/corporate citizenship through enrollment in and use of E-Verify. Some employers already use E-Verify as a condition of federal contracting or in order to receive certain additional immigration-related benefits, including certain petitioners under the similar H-2A program. *See* 8 C.F.R. § 274a.12(b)(21).

Option 2 – Create financial penalties for H-2B petitioners who fail to comply with the reporting requirements

Under current regulations, H-2B petitioners are required to notify USCIS when an H-2B worker fails to report for work within 5 work days after the employment start date without the employer's consent, completes the labor or services more than 30 days early, absconds, or is terminated early. Congress could amend the law to include a substantial fine for those H-2B petitioners who fail to report these violations to USCIS in a timely manner. In addition to, or in lieu of, payment of such a fine, Congress also could require such petitioners to enroll in E-Verify.

Option 3 – Mandate a DOL website registry

Congress could mandate that DOL establish a website registry that will advertise all prospective H-2B jobs to U.S. workers nationwide, including U.S. territories. By advertising these available jobs in this manner to U.S. workers nationwide, employers may be able to find available, able, willing, and qualified U.S. workers who may be interested in relocating to a different city or state for the job. Employers could be required to advertise and hire from this website registry as part of the labor market test.

Option 4 – Consider eliminating the use of, or increasing oversight over, recruitment agents

Congress could consider eliminating the use of agents in the process of hiring H-2B workers because agents (whether located in the United States or abroad) may harm workers through the imposition of unlawful fees, which are known to facilitate forced labor by leading to debt bondage. Agents also may petition for more workers than needed and disguise the true need for workers by filing one petition on behalf of multiple employers. This practice may be taking otherwise available visas from U.S. employers who truly need H-2B workers. This practice also may be used to facilitate human trafficking and migrant smuggling and/or the use of foreign labor to work in unauthorized positions that are not covered by the TLC filed with the petition.

In the alternative, Congress could consider increasing oversight of recruitment agencies and agents in the process of hiring H-2B workers. One example of increased oversight could include imposing requirements on foreign labor recruiters to register and receive certification and on H-2B petitioners to use only registered and certified recruiters to hire workers. Congress also

could bring a greater level of transparency to the H-2B worker recruitment process and protect workers from fraudulent recruiting schemes by requiring that the DHS collect and publicly disclose the names of the registered and certified agents and foreign labor recruiters used by employers, as well as the identities and locations of all the persons or entities hired by or working for the primary recruiter in the recruitment of prospective H-2B workers, and the agents or employees of these entities.

Option 5 – Increase the H-2B Fraud Detection and Prevention Fee

Congress could mandate that the H-2B Fraud Detection and Prevention Fee (presently set at \$150) be increased to \$500 to match the current Fraud Detection and Prevention Fee paid by H-1B petitioners.¹⁵ The increased funds would allow DHS, DOL, and the U.S. Department of State to protect American workers better by combating fraud, including through additional site visits to ensure that H-2B employers are complying with the regulations.¹⁶

Option 6 – Prohibit employers, recruiters, or their agents from charging H-2B workers certain fees associated with the filing of an H-2B petition

The regulations found at 8 C.F.R. § 214.2(h)(6)(i)(B) prohibit the H-2B petitioner, agent, facilitator, recruiter, or similar employment service from collecting job placement fees or other compensation from an H-2B worker as a condition of a job offer or employment. The regulations at 20 C.F.R. § 655.20 further prohibit the collection of certain additional costs, such as visa fees. However, to enhance the integrity of the H-2B program further, Congress could mandate that an H-2B petitioner, agent, facilitator, recruiter, or similar employment service may not pass along fees to the H-2B worker, including transportation, filing or visa fees, or other recruitment or job-related fees.

Option 7 – Prohibit employers from using both the H-2B and J-1 programs for fulfilling same or similar labor needs

Congress could prohibit employers from hiring J-1 participants if the employers also employ or will employ H-2B workers, where the J-1 participants will be employed to perform the same or similar services or labor described in the approved petition or to work at the same seasonal worksites as the H-2B workers. The J-1 exchange visitor program is intended to be a cultural exchange program, not a work program. However, some employers may be using the J-1 program for staff augmentation at seasonal workplaces, where they have J-1 participants engage in the same employment as H-2B workers. This can be seen in the J-1 Summer Work Travel program, which does not require a U.S. employer to offer and pay prevailing wages or to conduct a labor market test to demonstrate that there are no available, able, willing, and qualified U.S. workers for the position. The J-1 program should not be used to circumvent U.S. labor protections attached to the H-2B program.

¹⁵ See USCIS website, “H and L Filing Fees for Form I-129, Petition for a Nonimmigrant Worker;” <https://www.uscis.gov/forms/h-and-l-filing-fees-form-i-129-petition-nonimmigrant-worker>.

¹⁶ See 8 U.S.C. 1184(c)(13), 1356(v).

Option 8 – Codify DHS’s authority to publish an annual list of eligible countries that may participate in the H-2A and H-2B programs

Pursuant to current DHS regulations, DHS, with concurrence from the Secretary of State, annually publishes a Federal Register notice listing countries eligible to participate in the H-2A and H-2B programs. In determining which countries should be on the Eligible Country List, the Secretary of Homeland Security, with concurrence from the Secretary of State, takes into account several factors, including noncooperation on repatriation of the countries’ nationals with final removal orders. USCIS may approve H-2A or H-2B petitions only for nationals from these eligible countries unless the Secretary of Homeland Security determines that it is in the U.S. interest for a foreign national from a noneligible country to be the beneficiary of an H-2A or H-2B petition. Congress could endorse explicitly this requirement by codifying the current DHS regulations, promulgated under existing authority, prohibiting countries that do not cooperate on repatriation from participating in the H-2A and H-2B programs. In addition, it could define further what other factors may serve the U.S. interest in considering counties that are eligible to participate in the program.

Option 9 – Provide the Secretary of Labor the statutory authority to establish application fees for employers for processing TLC applications

Congress could enact the FY 2019 proposal to authorize the Secretary of Labor to charge and retain cost-based fees for applications filed for TLCs under the H-2B program and for prevailing wage determinations, with the understanding that petitioners cannot pass the cost of these fees onto workers.¹⁷ These fees would provide a stable, targeted, and appropriate source of funding that would help to ensure that applications, including applications under the H-2B program, are processed in a timely and effective manner.

Option 10 – Remove existing H-2B riders contained in the Appropriations Act with a 90-day transition period

Congress could remove current appropriations riders concerning corresponding employment,¹⁸ the three-fourths guarantee, and prevailing wages for the H-2B program. These riders prevent DOL from implementing regulatory policies that protect U.S. workers. The three-fourths guarantee in the joint DOL/DHS regulation requires employers to guarantee workers employment for a total number of work hours equal to at least three-fourths of the workdays in each 12-week period (or 6-week period for job orders lasting fewer than 120 days). Removing the three-fourths guarantee rider would benefit employers with a true need for H-2B workers by providing that those employers are not competing for the limited number of visas with employers that may not need the full number of workers requested. In addition, the corresponding

¹⁷ Providing DOL statutory authority to collect fees in the H-2A and the Permanent Labor Certification programs also would ensure that those applications are processed in a timely and effective manner.

¹⁸ See 20 C.F.R. § 655.5. The corresponding employment provision affects whether U.S. workers that work alongside H-2B workers will be offered the same protections and compensation as H-2B workers. The three-quarter wage guarantee protects U.S. workers because it requires the employer to consider and measure its temporary need for foreign workers and disincentivizes employers who bring foreign workers into the country unless they have a bona fide temporary need for their labor.

employment regulations provide critical protections to U.S. workers, ensuring that domestic workers receive the same benefits and wages as offered to H-2B workers when performing the same work. Finally, the current rider governing prevailing wage surveys permits an employer to submit a nongovernment wage survey to set the required wage rate for an H-2B job opportunity, even if a prevailing wage rate from a reliable government survey is available. Absent this provision, the regulation would allow only nongovernment surveys to be used to establish the prevailing wage rate if there are certain limitations to the government survey data in that local area. The regulation reflects that nongovernment surveys, as a general rule, have been used to lower the required wage below the wage that would result from a government wage survey. 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. Removing this rider would prevent better the employment of H-2B workers from depressing the wages of U.S. workers and may reduce the need for H-2B workers because U.S. workers will be more likely to apply for jobs that accurately reflect the prevailing wage. A 90-day transition period would allow for necessary transition activities, including any guidance and new forms, and to provide notice to stakeholders and the public.