Temporary Visa Report

Cornell Institute for Public Affairs
American Federation of Labor
Congress for Industrial Organization
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Executive Summary
The Cornell Institute for Public Affairs (CIPA) spring 2011 domestic Capstone course was tasked with researching and analyzing the H-1B, H-2A and H-2B visa programs for the AFL-CIO. The class was split into three research teams delegated to each of the visa programs. After immersing themselves into these visas and their respective literatures, each team conducted an analysis and developed recommendations for improving the integrity of each visa. Listed below are the summaries for each visa program, an outline of how each team developed their research project, and their corresponding recommendations. The members of this Capstone project feel that it is imperative for these recommendations to be truly considered in order to better serve both the American workforce and the H-1B, H-2A and H-2B visa recipients.

Summary of the H-1B Program

The H-1B visa program was created by Congress as an avenue for firms to bring temporary nonimmigrant workers into the U.S. for specialty occupations. It was intended that firms only use the H-1B program to complement unmet labor demand for skilled labor when comparable skilled labor could not be found in the domestic labor market without adversely impacting this market. Today, however, there is a great deal of controversy regarding how firms actually use the H-1B program and the effects that H-1B workers have upon U.S. wages, employment, and working conditions. Simultaneously, there is a great deal of controversy around whether H-1B workers are systematically treated unfairly by their employers, if fraud is an ongoing issue, and what measures should be taken to improve the integrity of the program. This report analyzes legislative reforms that have been proposed for the H-1B program, analyzes auction systems as a solution to the problem of allocating visas fairly and efficiently, and analyzes regulatory changes intended to improve the accuracy and availability of H-1B population data.

The H-1B report includes five sections. The first section is a literature review that provides a detailed description of several of the main controversies surrounding the H-1B program including its structure and related organic statute, the visa cap system, the prevailing wage requirement, and the importance of STEM professions and industries. The second section details our methodology for researching three primary policy research questions.

The third section presents findings from the investigation of these research questions, and contains an analysis of the proposed H-1B legislative reforms in the 2007 and 2009 Durbin Bills. This section also compares and contrasts three distinct auction systems and how effective they are at determining the number of visas allocated each year. Lastly, it analyzes the comprehensiveness and accuracy of data for H-1B workers as well as the effects of a clearinghouse system aimed to improve information-sharing efforts across the agencies that administer the H-1B program.

The fourth section details our policy recommendations with respect to our three policy research questions. In particular, we recommend:

1) An expanded investigative and enforcement role for the Department of Labor (DOL)

2) The creation of pilot programs to test how two distinct auction systems would operate in practice

3) The creation of a tri-department data clearinghouse to formalize information sharing across the DOL, DHS, and DOS

The fifth section provides a summary of our findings throughout the whole report and offers conclusions and next steps with respect to the three policy questions we identified.

Summary of the H-2A Program

The investigation of the H-2A visa program highlights the strengths and weaknesses of the H-2A visa. It is structured to offer recommendations to both strengthen the program and incentivize its usage. Research began with the objective of finding ways to improve the H-2A Visa program, which our analysis will show needs to begin with actual enforcement of existing H-2A visa law, and immigration reform. The following research questions served as the framework for our investigation:

1. What are the shortcomings of the current H-2A program?

2. How are these shortcomings being addressed?

3. Does the FLOC-North Carolina Growers Association Agreement serve as a model for the H-2A program nationwide?
In addressing the questions above, our team analyzed the history, workplace conditions, recruitment concerns, potential for collective action, and labor market constraints associated with the H-2A Visa program.

Our analysis reveals an underutilized program that offers workers the greatest protection of any H-visa class, yet ultimately fails to meet its intended goals. Enforcement of rules and regulations is porous at best, and the hiring of undocumented workers mitigates any inroads of the guarantees of the H-2A program. Those considerations contribute to the greatest quantifiable shortcomings of the visa, including workplace and living conditions that overwhelmingly do not abide by federal and state regulations, limited to non-existent collective bargaining opportunities for workers, and circumstances that make FLOC so unique that it cannot serve as a nationwide model. Even with weak enforcement, hiring undocumented workers proves far simpler for employers. For those employers who do hire H-2A workers, lack of federal and state enforcement of regulations leaves a great deal to be desired. This yielded critical concerns regarding the deplorable workplace and housing conditions that violate existing law, but that H-2A workers must contend with.

Thus, significant room for improvement within the program exists. The following serve as our recommendations to strengthen the H-2A Visa program:

1) Comprehensive, state-by-state analysis of the FLOC-NCGA Agreement
2) Regulation of intermediaries
3) Elimination of the system that binds workers to employers
4) Creation of a bi-partisan research organization

Inherent in these recommendations is the one consideration that is paramount to any H-2A visa program amendment: comprehensive immigration reform. Our analysis revealed intermediaries who operate unregulated, allowing for illegal hiring practices and the prevalence of unacceptable working and living conditions of H-2A workers. The prevalence of these hiring practices and conditions is a direct result from breakdowns in regulation and current law, exacerbated by a majority of employers who shy away from the H-2A program because hiring undocumented workers is easier and cheaper. Therefore, any recommendation authored within this analysis lacks effectiveness in the absence of a complete overhaul of our national immigration system.

Despite the concerns listed above, and the information gap in H-2A research, the recommendations provided are supported by existing data and capable of implementation. A comprehensive, state-by-state analysis of the FLOC-NCGA Agreement can allow for analysis of the mechanisms that would be necessary to create a program similar to FLOC in other states. Regulation of intermediaries will ensure hiring practices are fair and workers receive the full rights they are guaranteed. A system that does not bind employees to employers will allow for greater flexibility in economic mobility of workers while easing cultural adjustment issues they may have. Finally, the creation of a bi-partisan research organization to address the H-2A visa program’s shortcomings and potential solutions can hopefully close the information gap that continues to stall H-2A visa program improvement.

Summary of the H-2B Program

The review of the H-2B visa program included an extensive literature review that consisted of an initial program history, an analysis of employer and employee application steps and requirements to enroll and participate in the program, and major legislative and program changes that have occurred during the past five years.

During our examination of the program steps, the importance of intermediary bodies and the roles that they play creating connections between employers and potential H-2B employees are significant. Our investigation determined three types of intermediary bodies: employee-based, employer-based, and intermediary-based. Each intermediary type was divided according to their sources of funding with intermediary-based bodies having no clearly recognized source of funding. Unfortunately, despite the existence of some legitimate organizations, many have been witnessed to clearly violate program requirements and become a primary avenue for abuses. These abuses are seen to materialize in the form of exorbitant service fees which indebt worker-applicants, a practice that is not permitted under Subpart A.
During our analysis, four types of abuses were commonly identifiable among employers. First, employers have often submitted fraudulent application documentation, applications for unneeded labor, and overlapping H-2B applications that intend to fulfill a year-round position. Second, a category of general abuses was identified that includes substandard workplace conditions, threats against H-2B workers’ job security, and the illegal confiscation of H-2B immigrant visas by their employees. Third, employers are often found to charge H-2B workers excessive fees, providing subpar housing standards at rent rates high above market value, and unfairly garnishing workers’ paychecks for visa, broker, and transportation costs. The final and most frequent form of abuse pertains to wages. Often H-2B employees are paid significantly less than an occupation’s prevailing wage, and are not paid for overtime hours worked.

H-2B worker wage abuses are a chief concern of the program. In January, the Department of Labor (DOL) instituted a new Final Wage Rule mandating that employers pay H-2B workers the highest of three wages: prevailing wage (as established by either OES, the collective bargaining agreement, or the Davis-Bacon Act/Service Contract Act), the federal minimum wage, and the state minimum wage. Our investigation required the conduction of a gap analysis between H-2B worker wages and occupational prevailing wages determined by OES in the six states of highest H-2B worker populations. This analysis revealed that H-2B workers are, in general, paid between $0.37 and $5.69 per hour less than the average occupational prevailing wage. Most wage differences were identified as statistically significant within the 5% level. Based on historical H-2B program and OES wage data, during FY2010 most H-2B employers did not pay amounts comparable to wages now required under the new Final Wage Rule, resulting in a cheap labor alternative that produce market inefficiencies. Since H-2B employers have historically underpaid H-2B workers, it can be assumed that this area is the greatest avenue for employer abuses to occur; therefore it is our recommendation that additional oversight be provided to ensure that the new Final Wage Rule is enforced on the state-level.

Our economic analysis revealed that the introduction of the H-2B program could drag down overall wages paid to U.S. workers, as the program acts to artificially increase the supply of labor available for a U.S. occupation. Our analysis also examined the implications of this increase of supply in both boom and recession economies. The resulting effects of program inclusion are imbalances in the American labor market. This analysis naturally transitions into the need to reassess the current H-2B program cap, which is arbitrarily set at 66,000. We believe that the program cap ought to be reevaluated so that it reflects the annual state of current U.S. economic and employment conditions. To rectify this problem, it is our opinion that the program cap amount should reflect the annual State Workforce Agencies assessments of their state and regional economic and labor market needs.

Our case study analysis investigated the Temporary Non-Agricultural Employment of H-2B Aliens in the United States: Proposed Rule, released on March 18th 2011. Our investigation of this bill identified areas of appropriate program requirement support. Of specific importance is the move to replace the current attestation process with a front-end compliance based system in which documents are required to prove employer need prior to being granted approval for H-2B workers. Our analysis also identified bill inadequacies where additional regulations could be added to further enhance the integrity of the H-2B program.

Our examination of the H-2B visa program has brought to light the following recommendations. It is our joint opinion that these measures ought to be enacted in order to strengthen the integrity of the H-2B visa program. Also, as funding is always the key challenge when attempting to adopt and implement new processes, we have outlined several sources of funding that could be made available through the implementation of our recommendations (please see the full report for these funding opportunities and for more information on each recommendation).

The following are our recommendations to improve the integrity of the H-2B Program:

1) Oversight creation and strengthening the application process
   a. Creation of an oversight division within the DOL and SWAs to enforce program guidelines on the state-level
   b. Implementation of employee protection measures, including the creation of an employee complaint mechanism for H-2B workers to anonymously identify abuses
c. Enforcement of the new Final Wage Rule: creation of an employer ranking system based on audits and transgressions against H-2B workers

d. Creation of an intermediary body application process with firm requirements for program participation

e. Creation of a U.S. job database for the long-term, advertising H-2B job opportunities to the American workforce to be maintained by the SWAs

f. Offering of legal arbitration services to H-2B workers suffering from abuse

g. Funding opportunity enabling oversight creation

2) Implementation of new guidelines enabling H-2B worker mobility and tracking opportunities to prevent worker overstay

3) Modification to the H-2B program to ensure that the program only employs necessary temporary specialty labor

4) Reassessment of program cap to reflect actual American annual economic and labor market conditions
H-1B
EXECUTIVE SUMMARY

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Introduction

The H-1B visa study serves as a detailed investigation of particular aspects of the H-1B temporary nonimmigrant visa program. This report will provide a solid background on legislative proposals, considerations of potential methods for a fair market test of wages and visa caps, and data collection considerations, drawing on the Government Accountability Office's (GAO) 2011 report.

The sheer breadth and depth of the H-1B program, combined with the scope of this study, required focused attention, and as such, controversial issues of the H-1B visa program including free trade agreement cap adjustments, transition difficulties from the common F-1 student visa to H-1B or from H-1B to immigrant visa status, and other peripheral aspects of the program were noted, but not studied. All of these concerns are valid, and deserve -- if not require – a separate full study that can provide a comprehensive review of the program.

That said, this H-1B visa study paper represents a detailed study of economic, policy, and associated literature, and seeks to provide a nuanced view of the legislative history of the program, the difficulty in providing a reliable fair market test or prevailing wage, and the critical data issues inherent in H-1B administration. This study provides first steps – possible recommendations – for policymakers and other interested parties, and should be seen as a stepping stone to further potential reform and/or minor modifications.
In reviewing relevant literature, the H-1B visa project took a broad view of existing scholarly and government resources on H-1B visas to gain a deep understanding of background materials and define critical terminology. In response to tasking from the American Federation of Labor – Congress of Industrial Organizations (AFL-CIO), this review serves as a baseline of information from which the in-depth analysis of specific aspects of the H-1B program was based, and provides the scholarly underpinning for policy recommendations.

In particular, the literature review was designed to: describe the background of the H-1B program, provide a statutory analysis, and explain the influence of the Science, Technology, Engineering, and Math (STEM) fields on the H-1B visa program. It will describe research in the field regarding the make-up of H-1B workers and difficulties with the H-1B program, as well as present an understanding of the theory, rationale, and debate surrounding prevailing wages and the H-1B visa cap.

**Background of H-1B**

The H-1B visa program is a non-immigrant temporary visa program that aims to supply the U.S. labor market with foreign workers in specialty occupations where labor shortages exist. The Immigration Act of 1990 defines a “specialty occupation” as one that requires the “theoretical and practical application of a body of highly specialized knowledge and... the attainment of a bachelor’s degree or higher (or its equivalent) in the field of specialty.”

The existing H-1B program, named by the statutory section in which it resides, was established by the Immigration Act of 1990, an amendment to the Immigration and Nationality Act made to feed unmet labor needs by creating additional avenues for non-immigrant workers to be brought into the U.S. While the statute itself does not provide a specific definition of what constitutes an unmet labor need, it does provide specific instructions to employers for obtaining H-1B visas for prospective employees, as well as specific definitions of eligibility and administrative construction.

Section 205 of the Act designates a maximum number of visas that can be issued in a given fiscal year. This visa cap is not static; in fact, the number has changed several times over different years, more specifically, between 1998-2003 when the cap peaked at 195,000. In recent years, the cap has remained at 65,000 issued visas per government fiscal year.

**How does Congress define H-1B Visa Workers?**

Under Title 8 of the U.S. Code, Chapter 12, Subchapter 1, § 1101 (a) (H) (i) (b), an H-1B eligible worker is:

an alien... who is coming temporarily to the United States to perform services... in a specialty occupation described in section 1184 (i)(1) of this title or as a fashion model, who meets the requirements for the occupation specified in section 1184 (i)(2) of this title... with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section1182 (n)(1) of this title, or... who is engaged in a specialty occupation described in section 1184 (i)(3) of this title, and with respect to whom the Secretary of Labor determines and certifies to the Secretary of Homeland Security and the Secretary of State that the intending employer has filed with the Secretary of Labor an attestation under section 1182 (t)(1) of this title.

In short, the statute describes a prospective H-1B worker as a non-immigrant alien worker who seeks to come to the U.S. to work in a specialized field in which there is a congressionally determined demonstrable need (through inclusion in the H-1B program as a specialized occupation) for workers that has not been met by the internal U.S. job market.

The statute also articulates what a “specialized occupation” entails, making specific declarations as to requirements. The sections relevant to H-1B visas dictate that (emphasis added):

(1) The term “specialty occupation” means an occupation that requires—

(A) theoretical and practical application of a body of highly specialized knowledge, and

(B) attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

(2) For purposes of section 1101 (a)(15)(H)(i)(b) of
Finding the Labor Need and Advertising the Position

The H-1B program allows for employers to hire foreign, non-immigrant workers, for positions that cannot be filled by U.S. workers. The assumption of the program is that available U.S. workers do not have the requisite education, training, and/or experience needed for the advertised positions. However, no detailed requirements exist to determine what specific gaps workers will fill in the economy. While it may be inferred that H-1B workers would only be hired if an unmet need existed in the job market, this does not appear to be a statutory requirement. The employer must simply ensure that “the employment of H-1B workers will not adversely affect the working conditions of U.S. workers similarly employed.” Otherwise, they may hire an H-1B worker for a position as long as that worker’s training and experience are directly applicable to the position.

By statute, all employers are required to attest to the following:

(A) The employer—

(i) is offering and will offer during the period of authorized employment to aliens admitted or provided status under section 1101 (a)(15)(H)(i)(b1) of this title wages that are at least—

(A) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question; or

(B) the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the attestation; and

(I) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question; or

(II) the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the attestation; and

(ii) will provide working conditions for such a non-immigrant that will not adversely affect the working conditions of workers similarly employed.

(B) There is not a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment.

(C) The employer, at the time of filing the attestation—
(i) has provided notice of the filing under this paragraph to the bargaining representative (if any) of the employer’s employees in the occupational classification and area for which aliens are sought; or

(ii) if there is no such bargaining representative, has provided notice of filing in the occupational classification through such methods as physical posting in conspicuous locations at the place of employment or electronic notification to employees in the occupational classification for which non-immigrants under section 1101(a)(15)(H)(i)(b1) of this title or section 1101(a)(15)(E)(iii) of this title are sought.\textsuperscript{12}

If the above conditions are met, employers can continue with the application process once they identify the non-immigrant employee(s) that they wish to hire.

A company that aims to hire an H-1B worker may be required to advertise the position to domestic workers depending on its classification as an “H-1B dependent employer” or “non H-1B dependent”, and whether it has been found to have violated any H-1B rules or regulations in the past.\textsuperscript{13} Specifically, an H-1B dependent employer is defined by the DOL to be an employer that has:

25 or fewer full-time equivalent employees and at least eight H-1B non-immigrant workers; or

26-50 full-time equivalent employees and at least 13 H-1B non-immigrant workers; or

51 or more full-time equivalent employees of which 15 percent or more are H-1B non-immigrant workers.\textsuperscript{14}

Employers who are H-1B dependent as defined above, or who have violated H-1B program rules listed in the Immigration and Nationality Act (particularly § 212(n)), face stricter requirements when hiring new H-1B visa employees.\textsuperscript{15} Those employers must first verify that they have advertised the position to U.S. workers prior to seeking non-U.S. workers, and that the wage advertised and paid is the same as that of a comparably skilled domestic worker.\textsuperscript{16}

Specific employer actions to apply for H-1B visas

Employers seeking to apply for H-1B visas must do so within a specific window for visas that will be issued in the following fiscal year and those applications must be submitted prior to the visa cap being met. For example, the window for fiscal year 2011 (beginning October 1, 2010) opened April 1 2010, and the cap was reached on January 26, 2011.\textsuperscript{17} Throughout this process, the employer is responsible for submitting the bulk of the documentation to the applicable government agencies described below, and the employer must pay all of the fees for the application process.

Specifically, they must submit a Labor Condition Application (LCA) and Immigration Form I-129.\textsuperscript{18} The LCA is a document that includes specific information about the employer, the proposed wage for the employee, and work location. In submitting the LCA, the employer confirms the following to the DOL:

The H-1B workers will be paid a guaranteed prevailing wage (or the equivalent wage of workers with the same qualifications and experience);

The employer has notified current employees at the place of employment of the intent to employ H-1B workers; and

There will be no negative effects or discrimination towards the existing U.S. workers, and no adverse impact on their working conditions.\textsuperscript{19}

**Government Actions**

The following explanation of the application process assumes an application for a new H-1B visa holder who is not currently in the U.S. on an H-1B visa. The below explanation generally holds for those who will transition from different visa programs (F1 student visa, etc.), but potential small differences in those scenarios are not covered here.

**Step 1: Department of Labor**

When the employer submits the LCA to the DOL, it is routed to the Employment and Training Administration, where it is reviewed for obvious errors and inaccuracies based on those requirements. If the LCA is not overly inaccurate and conforms to general rules, the Employment and Training Administration approves the LCA, and sends that approval back to the prospective employer, granting them permission to submit the I-129 immigration form.\textsuperscript{20}

**Step 2: Department of Homeland Security**
After the LCA has been approved by DOL, the employer submits an I-129 petition to the United States Citizenship and Immigration Services (USCIS), a component of DHS. The I-129 petition is the actual immigration petition for the H-1B worker, and it includes specific information about the individual, their proposed wage, work location, a description of the employer, the prospective position of the employee, and proof of the worker’s qualifications. USCIS is responsible for determining if the LCA and I-129 are consistent with one another, whether the employer meets eligibility criteria, if the position is a specialty occupation, and if the prospective employee is qualified for the position. If those conditions are met and the application was submitted within the visa application window, the I-129 will be approved and sent on to DOS if the worker is not already in the U.S.

Step 3: Department of State

State’s responsibility involves verifying the individual’s eligibility for admission to the U.S. DOS receives a package of supporting documents from the prospective employee and compares those against information from an in-person interview as well as various U.S. government databases. After the employer and employee are notified of LCA and subsequent I-129 approval, the worker is then responsible for setting up a meeting at the U.S. embassy or consulate in the country where he/she currently resides, if the prospective employee is outside the U.S. Following agency database checks and an in-person interview, if no issues arise, the final visa is processed and issued to the worker’s passport.

While the visa is placed in the employee’s passport, it is critical to note that the DHS may still reject a prospective H-1B worker at the border control station when he or she enters the U.S. if paperwork does not match, or if other derogatory information appears.

H-1B Visa Cap

The H-1B “cap” is the annual limit of H-1B visa applications received for non-immigrant alien workers. The cap is set by Congress and determines the number of workers authorized to be admitted on an H-1B-type visa or authorized to change status if already in the U.S. Therefore, there are two ways to be counted against the cap: applying for an H-1B visa or changing status to H-1B from another non-immigrant status (such as F-1, L-1, J-1, etc.). Critically, it is important to note that various exceptions from the cap exist. Workers who hold master’s degrees or above in their field from accredited U.S. institutions fall under a separate annual cap of 20,000 visas. Workers who currently hold H-1B visas and apply for extensions also do not count against this 65,000 cap.

Under the Immigration Act, the first cap of 65,000 was set in fiscal year 1991 by Congress. In the first years following its enactment, the number of H-1B visas generally fell below the cap, hitting the statutory limit only in 1997 and 1998. After fiscal year 1999, demand for foreign workers under the H-1B program increased and employers have, in general, been reaching the H-1B cap prior to the application deadline. The demand has been in large part driven by the high-tech industry which lobbied for Congress to increase the cap. The lobbying process faced fierce opposition in Congress from labor union representatives because they believed there was a possibility of discrimination toward domestic workers. A political compromise was reached in October 1998 when the American Competitiveness and Workforce Improvement Act (ACWIA) increased the cap to 115,000. In 2004, the cap reverted to 65,000 following Congressional action due to political belief that a lack of demand for workers existed.

Criticism of the Cap, and Potential Alternatives

The main criticism of the H-1B visa cap found in the literature is that it has not reflected American businesses’ actual labor demand since the program’s inception and is instead set arbitrarily through negotiations among Congressional staff. Critic Gabrielle Buckley asserts the cap is “a number that apparently is ‘randomly chosen without regard to American businesses’ need for or actual use of these visas.” Other critics generally concur. Katayama and Kinney state that “despite its proven usefulness, the current H-1B visa program under the ACWIA still unduly restricts American business from optimally utilizing the program in pursuit of economic competitiveness.” Even the U.S. Commission on Immigration Reform, which generally favors more restrictive immigration law, “recognizes that limitations might reduce the flexibility of businesses adapting to economic changes.”

In the reviewed literature, many authors share concerns about the business validity of Congress’ cap setting process and have produced potential alternatives. One that seems to have gained traction
in the business sector includes the creation of new, “unlimited ‘Tech-visas’ for recent foreign graduates of American graduate programs in science and engineering, who are currently on student visas.” The proposal suggests that in order for a foreign worker “to qualify for a T-Visa, the foreign applicant must hold a job offer for a position with an annual salary of $60,000 or more.”

**Prevailing Wage**

The H-1B program requires that each employer provide detailed wage information upon submitting the LCA for a visa. Employers specify the wage they will pay employees, and the wage supplied must be equal to or greater than the prevailing wage in that particular industry. The prevailing wage requirement of the H-1B visa program is not only a simple statistical metric but also a source of intense controversy and debate regarding its effects on domestic and non-immigrant workers.

A consistent lack of data over time on nearly every category of information about H-1B workers themselves has meant that relatively few studies have been conducted on the effects that the H-1B program has on the wages of H-1B workers and their domestic counterparts. Moreover, most of the research that does exist is only descriptive in nature, necessarily limited by data constraints that preclude more complex analyses. Due to these restrictive data constraints, most prior research that has attempted to analyze the effect of the H-1B program on the wages of both domestic and non-immigrant workers has relied upon raw data published by a small number of publicly available government sources. In particular, most studies have utilized two sources:

- Contemporaneous prevailing wage data gathered from LCAs submitted by employers to the DOL and published by the DOL’s ETA; and
- Summary statistics on H-1B visa petitions published annually by USCIS.

Both sources rely heavily upon the prevailing wage metric as a way of organizing data they have collected, analyzing that data, and making a determination as to whether an employer’s application for an H-1B visa should be approved. In turn, the purpose of prior research into the prevailing wage metric has been to estimate if, and to what extent, wages and working conditions facing H-1B and domestic workers differ from one another.

Controversies and debate typically revolve around the usefulness of the prevailing wage metric as a proxy for determining local market wages and the extent to which fraudulent practices or technical violations by some employers permit them to systematically pay H-1B workers less than the prevailing wages of their domestic counterparts and simultaneously use them as a source of cheap foreign labor.

In its simplest form, the “prevailing wage” is a benchmark against which the Office of Foreign Labor Certification (OFLC) of the ETA inside the DOL can gauge whether the wages offered to workers entering on H-1B visas undercut the wages offered to domestic workers in comparable professions, regions, and industries. The literature shows that the requirement that employers pay H-1B workers a wage at least as great as the prevailing wage was intended by Congress to act as a safeguard to protect those workers from unfair treatment or working conditions, as well as to prevent downward pressure on the wages of domestic workers. However, there are instances where several different estimates of the prevailing wage exist under the Immigration and Nationalization Act (INA) and later statutes for a given profession, industry, and region. As a result, ETA permits employers to choose among three different sources of information in reporting the amount that the prevailing wage for each occupation should be when the employer applies for an H-1B visa.

These sources are:

- previously negotiated collective bargaining agreements;
- employer-provided surveys of local firms in an employer’s respective industry; and
- wage levels by profession determined by the Bureau of Labor Statistics (BLS) through its Occupational Employment Statistics (OES) program.

The most commonly used method for determining the prevailing wage is taking a weighted average of all wages reported by occupation to the BLS in large national surveys that are conducted annually as part of its OES program. Every year since 1999, the BLS has supplied wage data to the OFLC that have been collected and classified by Standard Occupational Codes (SOCs) and segmented by four ascending experience levels beginning at the entry level (Level I)
and graduating to fully competent, experienced staff (Level 4). Critics of the H-1B program argue that in practice, employers often pay H-1B workers below market wages for their profession, industry, and geographic region. Indeed, some critics have even gone so far as to say that there is no empirically observable shortage of skilled workers in the U.S. Rather, those critics allege that employers principally use the H-1B program not as a means of obtaining skilled labor that cannot be found in the domestic market, but as a means of reducing labor costs in professions in which there are abundant, but more expensive domestic workers. In general, criticisms of the prevailing wage metric focus on institutional features of the H-1B program’s compliance system and/or issues of definition and data aggregation that limit the effectiveness of the prevailing wage as a safeguard for domestic and non-immigrant workers. A 2010 study identified four principal design flaws in the H-1B program that have allowed employers to pay H-1B workers less than their domestic counterparts, namely:

- a lack of an effective labor market test;
- prevailing wage guidelines from the OFLC that allow employers to undercut local market wages;
- excessive leverage held by employers over H-1B employees as a result of employers rather than employees being issued the H-1B visas; and
- a lack of effective oversight and enforcement by federal agencies.

In other words, critics of the H-1B program argue that the prevailing wages reported by employers on their LCAs to the ETA are frequently lower than the market wages in local regions and that this is especially true amongst prevailing wages estimated using employer surveys.

Critics also point to specific industries and professions in order to illustrate what they consider adverse outcomes for both domestic and non-immigrant workers as a result of the H-1B program. In particular, critics argue that in STEM professions, large earning differentials exist between compensation levels for H-1B workers and domestic workers in the same profession that serve to undercut employment opportunities of the domestic workforce. Likewise, in post-doctorate positions, non-immigrant wages depress the wages of domestic workers. For example, a study from 2005 published by the Center for Immigration Studies (USCIS) found that, on average, H-1B workers in computer occupations were paid annual wages that were $13,000 lower than those of their American counterparts. The same study also found wages for 85 percent of H-1B workers in computer-related occupations were lower than the median U.S. wage for the same occupation and state, and the firms employing large numbers of H-1B workers tended to pay substantially lower average wages than firms hiring smaller numbers of H-1B workers. A study from 2006 looked at wage rates amongst post-doctoral workers and aggregated non-citizen H-1B visa holders, naturalized citizens, and non-citizen permanent residents (which the author defined as ‘immigrant’ in comparison to ‘native’ workers). The study found that a 10 percent increase in the supply of doctorates from immigration caused the wages of competing workers from the US to fall between 3 and 4 percent. More specifically, the study used data from the Survey of Earned Doctorates (SED) and the Survey of Doctoral Recipients (SDR), both of which are maintained by the National Science Foundation. The SDR in particular contains detailed information about the wages and earnings of workers that have obtained doctoral degrees in science or engineering.

Moreover, some studies undertaken by federal agencies to review the H-1B program have found evidence that employer fraud and misconduct related to prevailing wage requirements have been common practice in the past 5 years. A 2008 study by USCIS analyzed a random sample of 246 LCAs filed by employers between October 1, 2005 and March 31, 2006, and found that 33 cases represented actual fraud and an additional 18 cases represented technical violations, for a combined overall violation rate of 20.7 percent. The violations, both fraudulent and technical, included (among other problems) failure to pay workers the pledged prevailing wage and listing job duties or responsibilities significantly different from those performed by the employee. A later study by the GAO published January of 2011 emphasized that fragmentation and restricted oversight authority across multiple federal departments weakened the requirement that firms pay H-1B workers the prevailing wage. The report further stated that the program lacked legal provisions for holding employers accountable when hiring H-1B workers.
through staffing agencies, and that statutory changes have allowed less qualified workers to be eligible to participate in the program (and in doing so, put downward pressure on domestic wages). Moreover, for the 2009 fiscal year, failure to pay employees a prevailing wage was the most common violation filed against employers in the H-1B program.

However, other studies by academic institutions and private organizations have found little evidence of the widespread abuse of the H-1B visa system reported by the program’s staunchest critics. Some of these studies have found that the wage gaps between workers entering the U.S. on H-1B visas and domestic workers are very small on average and largely disappear after controlling for factors related to H-1B workers’ human capital and productivity.

For instance, a 2006 study by the Peterson Institute for International Economics found evidence of wage cost-cutting by employers but also found that H-1B recipients as a group received wages equal to at least 95 percent of the prevailing wage and found no evidence of systematic abuse of the H-1B program by employers. In addition, a 2010 study conducted by faculty at the University of Maryland found that H-1B IT workers actually achieved a salary premium compared to IT professionals with U.S. citizenship after controlling for factors related to human capital accumulation such as education level, type of industry, and firm-specific IT experience. Essentially, the study found that H-1B workers were actually paid slightly more than U.S. citizens with equivalent skill levels and years of professional experience.

A 2005 study by the World Bank suggests that skilled immigrant and migrant graduate students and technical workers were significant inputs into the development of new technologies that raised productivity and real wages for domestic skilled workers. One of the important implications of their study was that even if highly skilled immigrant and non-immigrant foreign workers depressed wages in the short term, they could dynamically raise the productivity and real wages of domestic skilled workers over time by increasing the rate of technological innovation in the U.S. economy. Domestic workers in the U.S. and their immigrant and foreign non-immigrant counterparts could possess complementary skills that would allow all of them to achieve net gains in real wages over time.

Similarly, other reports by government agencies have found either little evidence that the presence of H-1B workers depresses the wages received by domestic workers, or inconclusive evidence regarding the effect of the H-1B program on prevailing wages for domestic workers. For example, a 2003 study by the Federal Reserve Bank of Atlanta found that the influx of H-1B workers during fiscal year 2001 had no negative effects on contemporaneous employment, average earnings, or earning growth of domestic workers in comparable IT professions.

More recently, the GAO report from January 2011 found that 54 percent of workers with approved LCAs were for entry-level positions from June 2009 through July 2010. However, the GAO report also stated that major data restrictions prevented them from making a conclusive finding as to whether H-1B workers are generally considered less skilled than their domestic counterparts, or whether they are more likely to accept a lower job title, lower prevailing wages, or lower positions than their domestic counterparts. The GAO report suggests that at a minimum, it is very difficult to empirically and systematically observe different wages between populations of domestic workers and populations of H-1B workers that possess equivalent skills and experience levels without better raw data, and that this problem would be common to all research efforts into this issue. Moreover, the GAO concluded that data limitations and complex economic relationships hindered its ability to estimate the impact that raising the quota cap would have on wages and employment of domestic workers.

These findings suggest that trying to forecast the effect that raising or lowering the labor supply through the provision of a larger or smaller number of H-1B visas would have upon the prevailing wage is a non-trivial technical challenge and that studies that attempt to do so may lack key information or sacrifice some accuracy in their models.

**What is STEM?**

While the H-1B program is broadly defined to permit specialty workers in any professional field, the majority of H-1B visas are issued to workers in the science, technology, engineering, and math (STEM) fields. The STEM fields are not specifically designated by statute, but their importance in F-1 and H-1B visa types has not been lost on the U.S. government. In 2008, the DHS, through U.S. Immigration and Customs, released a rule in the Federal Register specifically designating what the government considers STEM
degrees. This rule specifically applies to a post-study training program, but its statutory designation of STEM fields is instructive for this study and serves as this paper’s definition of STEM.

The DHS does not separate H-1B visas into STEM vs. non-STEM, although it does provide generic job titles that are informative. In 2005, nearly half of H-1B visas were issued in computer programming or IT related fields. When the DHS data is taken in light of Immigration and Customs Enforcement’s (ICE) STEM field designations, the result is startling. In 2004, 68.6 percent of H-1B visas were issued for STEM workers. In fiscal year 2005, that percentage fell slightly to 67.5 percent.

The preponderance of STEM-related H-1B visas has continued in recent years. In a recent report by the GAO, computer systems analysis and programming accounted for 42 percent of all H-1B visas issued during fiscal years 2000-2009. The total number of STEM positions in this time period is not readily available, as GAO uses a broad category of “all others.” Regardless, STEM fields account for 55 percent of all H-1B visas issued from fiscal years 2000-2009.

**Prevalence of STEM fields amongst H-1B workers**

Technical occupations are often defined as those related to STEM. National Science Foundation data indicates that “students on temporary visas earned about one-third (32 percent) of all Science and Engineering doctorates awarded in the United States in 2003.” Further, government data shows that STEM fields (as defined by ICE) account for a majority of H-1B I-129 petitions. In fiscal year 2005, 43 percent of petitions were solely for computer-related occupations and more than 60 percent of all H-1B petitions were for the wider STEM fields.

**Debate about H-1B (STEM) workers**

H-1B workers, especially those in STEM fields with advanced degrees, have been a subject of fierce political debate throughout the life of the H-1B program. These debates continue to influence immigration policy today, and involve well-known authors, policymakers, and statesmen. A review of the literature suggests that critics of the program publish more than proponents do, though persuasive arguments have been made by both sides.

One of the most prevalent arguments made against the program is that it exists simply to provide an easy way for employers to hire low-wage, tethered employees. Economist Milton Friedman, in ascribing to this view, called the H-1B program a “corporate subsidy,” and declared that the program is simply a way for employers to get low-wage workers who are exclusively tied to their firm. He elaborated on how “the [H-1B] program is [simply] a benefit to their employers, enabling them to get workers at a lower wage, and to that extent, a subsidy.”

Alex Nowrasteh from the Competitive Enterprise Institute rejects this claim, and instead points out that “there is little direct competition between foreign highly skilled workers and similarly skilled Americans. Foreign workers complement American workers and push them into different higher paying occupations.” In other words, Nowrasteh sees the H-1B program as good for the U.S. economy, especially since “highly skilled foreign workers are typically well educated, English speaking, and young. They receive high levels of compensation, do not consume social programs, and do not commit crimes more than the general population.”

Other critics ignore the concept of employer benefit, and instead focus on the structure of the program itself. Dr. David Goodstein noted in *American Scholar* that American taxpayer support of universities that train foreign students could result in a benefit to the American economy given that some of those students would stay in the U.S. and take jobs that could benefit the economy.

Other policy experts believe that IT companies may not need as many H-1B workers, and are instead using the H-1B program for easy outsourcing once the H-1B visa expires. In particular, Dr. Matloff mentions that “universities hoped to get increased government funding for science and engineering programs to cope with the labor ‘shortage;’ many university postgraduate programs are populated largely by foreign students who hope to gain H-1B status in the U.S.; and the universities are major employers of H-1B workers themselves.”

**What is the background of H-1B workers?**

Most H-1B workers are from India, China, and Canada. The GAO said that between fiscal year 2000 and fiscal year 2009, 46.9 percent of the total approved H-1B visa holders were born in India, 8.9 percent of them
Methodology

To enhance the project’s comprehensive understanding of H-1B visa program system and to arrive at substantive recommendations, the H-1B team embarked on research through a number of different primary and secondary sources.

At the beginning of the project, the team conducted an extensive literature review to provide pertinent background information of the establishment of the H-1B visa program, primarily using secondary sources such as the Immigration Act of 1990 and various academic and governmental reports. The team attempted to engage in a rigorous analysis of the prevailing wage issue, specifically based on OES immigration wage data. Given considerable data reliability concerns, it was decided that that analysis would provide limited value, and was abandoned in exchange for a more focused analysis of the legislation, auction system, and data issues. Research questions were designed following a discussion with the client lead, Ms. Ana Avendaño, Associate General Counsel and Director on Immigrant Rights Project at the AFL-CIO.

To accomplish those objectives, the team’s analysis again used secondary sources on previous and current legislative bills that focused on the H-1B program. By conducting an extensive review of major bills pertaining to the H-1B visa program from 1996 to 2011, we found and analyzed legislative trends of action across time. Per the client’s request, the team focused specifically on the 2007 and 2009 Durbin bills. Based on these two Durbin bills and the previous legislative history, we selected and detailed issues of great concern to members of Congress, including protection of domestic workers and enforcement of authorities, and made recommendations accordingly.

To answer the client’s second research question, the team researched and compared three different models of potential visa auction systems and offered recommendations. The team again used secondary sources such as government reports, peer-reviewed articles, online catalogs, and books, to gather different opinions and perspectives in this phase. This portion also involved the limited use of primary source discussions as a complement to research. Those include discussions of the major issues surrounding the auction systems with experts in the field. During a visit to Washington DC, the team presented research and findings with experts at the AFL-CIO.
and Migration Policy Institute (MPI). Our discussion with Mr. Marc Rosenblum from MPI provided useful background suggestions on reforms of the H-1B program in terms of structure construction and fraud detection.

One major limitation of the research was the inability to gather reliable, consistent data on the H-1B program. As analyzing prevailing wage is a crucial step in analyzing the current H-1B visa program, the lack of reliable data is undoubtedly a limitation of any study conducted on the H-1B program. The ambiguous effects of different systems on the domestic workers’ condition were largely due to a complex economic mechanism within which the labor demand, supply, and elasticity of H-1B workers is generally unknown to the government and other researchers.

Legislative Analysis

In order to provide a complete set of recommendations on legislative changes for the H-1B program, it is important to understand the full legislative history surrounding the program. This history, which includes both passed and failed bills, provides an important insight into the thoughts of Congress throughout the life of the program, and provides a starting point for the analysis of potential changes.

This history is broken down, broadly, into two time periods: FY 1996 – FY 1997 and FY 1998 – present, with particular emphasis on bills introduced by Senators Durbin and Grassley. The analysis ignores the period from creation through to FY 1995, as there was no significant legislative action with respect to the H-1B visa program.

FY 1996 - FY 1997

From FY 1996 to FY 1997, bills that were introduced largely focused on adding statutory definitions and basic requirements for the program. There was little discussion about changing the H-1B visa cap at this time, as reform acts were more focused on further refining the program itself through incremental updates.

For example, in 1996, Senate Bill (SB) 1665, the Legal Immigration Act of 1996 was introduced by Senator Orrin Hatch, but did not pass. The bill itself was primarily made up of technical amendments that changed specific requirements, but not the spirit of the program. SB 1665 sought to revise the H-1B program by providing more explicit statutory authorization for investigations of employers, creating of penalties for a variety of actions, and adding a statutory definition of what constituted an H-1B dependent employer. In particular, the bill would have limited the ability of the Secretary of Labor to undertake investigations to only those firms that are H-1B dependent, raised fines for H-1B violators from $1000 to $5000, and added a 5 year “probationary” term in which H-1B dependent firms would be treated as nondependent.

Following the failure of the 1996 bill, The Protecting American Workers Act of 1997 was introduced by Representative John Conyers (D-MI) specifically to “impose additional requirements on employers of H-1B nonimmigrants.” This marked the first apparent legislative attempt to add restrictions to H-1B employers, and one of the first bills aimed at protecting
domestic workers from the potential negative effects of non-immigrant visa holders. The bill aimed to amend the program “with respect to the following conditions of H-1B nonimmigrant employment: (1) compensation level; (2) U.S. worker displacement and recruitment; (3) H-1B worker dependence; (4) job contractors; (5) misrepresentation penalties; (6) period of admission; and (7) foreign residence requirement.”

Specifically, the text of the H.R. 119 shows a particular focus on ensuring that employers do not use the H-1B program to replace domestic workers; it requires that for employers to be eligible for H-1B visas, they must not have laid off domestic workers in the six months prior to the filing of the LCA, and 90 days following the filing of the LCA or any immigration petition. The focus of legislative proposals for the H-1B program was slowly turning from technical amendments and small updates to reform efforts.

The following year, the American Competitiveness Act passed the Senate, directing increased penalties for violations of the H-1B programs, protections for H-1B aliens who filed motions against an employer, and the authorization of H-1B aliens “to accept academic honorarium payments for services on behalf of an institution of higher education or other nonprofit entity.”

The bill, as passed by the Senate, also aimed to increase funding for STEM programs in the U.S. and required the Attorney General to provide an annual report on the number of H-1B visas approved at certain times. While the bill died once it was sent to the House of Representatives, the fact that the bill passed the Senate on a 78-20 vote shows that the Senate had begun to seriously consider reforms to the H-1B program by 1998.

More telling is the fact that the language of this bill began to present the concerns of the Senate that the U.S. was facing a lack of computer science graduates, and that the quota cap system might not meet the demand of the economy. This concern over quota caps, new to the legislative debate on the program, was carried forward into the next major period of legislative action.

**FY 1998 - 2004**

During this period, introduced bills that addressed the H-1B visa program were largely in favor of H-1B workers in terms of increasing the visa quota cap, decreasing requirements in the application process, etc. From FY 1998 to FY 1999, bills introduced in Congress generally supported increasing the quota cap level. For example, the Temporary Access to Skilled Workers and H-1B Nonimmigrant Program Improvement Act of 1998 suggested temporarily increasing the annual number of skilled foreign worker H-1B visas, and established prevailing wage criteria for certain occupations.

The act aimed to reemphasize that H-1B aliens can “accept specified academic honorarium payments for services on behalf of an institution of higher education or other nonprofit entity.” This bill also addressed the importance of protecting American workers and maintaining an accurate track of the number of H-1B non-immigrants, their occupations, and their countries of origin.

Congress began to focus heavily on immigration and specifically on the H-1B program following FY 1999. As Graph 1 displays, the number of bills that address immigration and the H-1B program increased after 1999. While not all of these bills were substantive in nature, this increase shows that Congress began to focus more intensely on immigration. In 2000, the American Competitiveness in the Twenty-first Century Act of 2000 was enacted and served to be one of the first H-1B-update bills to pass both Houses of Congress and be signed into law. The act provided a number of updates to the H-1B visa program caps and appears to expand on previous Congressional concern over the availability of H-1B workers to meet labor demand. Specifically, it increased available nonimmigrant H-1B visas for FY 2001 through 2003, reduced application processing and enforcement allocations, excluded foreign student or teacher nonimmigrant aliens from specified H-1B caps, and provided for one-year extensions of authorized H-1B workers in cases of permanent residence adjudications lasting 365 days or longer.

In 2002, the 21st Century Department of Justice Appropriations Authorization Act was passed and enacted as law. This law extended the H-1B visa status in one-year increments for an alien who has waited 365 days or longer since the filing of: (1) an application for labor certification; or (2) a petition for immigrant status.

The changes in both the 2000 and 2002 Acts display a Congressional mindset favorable to the employment of H-1B workers. Subsequently, it was easier for employers to hire foreign H-1B workers and extend workers’ stays across time, and made it easier for employees to remain in the U.S. towards the end of their H-1B visa status.

However, bills introduced since 2005 have attempted...
to add restrictions on the program. H.R. 4818, the Consolidated Appropriations Act of 2005, restricted the H-1B program by specifically reiterating the rights of U.S. workers: it increased the petitions fees from $1,000 to $1,500 and required the enhancement of accuracy in the calculation of prevailing wages for non-immigrant foreign workers. Throughout this period, the arbitrary quota system was being reconsidered in Congress, and in 2006, a market-based calculation approach was introduced as an alternative. This method, introduced by S. 2611 the Comprehensive Immigration Reform Act, suggested that for each subsequent fiscal year, a 20 percent increase on the cap for the following year could be added if the previous year's quota was reached. The bill also would have exempted those non-immigrant aliens who held an advanced degree in STEM fields from H-1B cap limitations. While the Comprehensive Immigration Reform Act failed to pass the House in 2006, its legislative history shows that reforms of the H-1B program were becoming more important in the Senate. The bill attracted six co-sponsors from both sides of the aisle, including Senator Sam Brownback (R-KS) and Senator Edward Kennedy (D-MA). The final third reading roll call vote was 62-36, showing again the Senate’s desire to update the H-1B program.

The greatest period of Congressional action pertaining to the H-1B program came between FY 2007 and FY 2009 (See Graph 1). During this period, the largest number of bills was introduced, including the well-known Durbin/Grassley reform bills that were introduced in both 2007 and 2009. During this time period, the bills introduced tended to concentrate more on the protection of native workers and the investigative power of the Secretary of Labor. While there was a great deal of legislative action during this period, none of the major reform bills that were introduced were passed through Congress and entered into law. A specific analysis of the policy recommendations of the Durbin/Grassley bills will be provided below.

Lastly, from the period of FY 2010 to FY 2011, Congressional action revolved mostly along the technicalities of specific restrictions on the use of visa funds. The most recent bill introduced in regards to the H-1B program is H.R. 399, the STAPLE Act of 2011. This act aims to amend the Immigration and Nationality Act to exempt U.S.-trained PhDs in STEM fields from the H-1B visa caps. The bill has been referred to the House Subcommittee on Immigration Policy and Enforcement, with no further action as of this writing.

**Common Issues Addressed by Legislation**

After analyzing previous bills, it appears that although issues addressed vary from year to year, some common foci exist and are frequently mentioned in legislative proposals, such as an emphasis on the protection of

![Graph 1 (Data source: http://www.govtrack.us/)](http://www.govtrack.us/)
American workers. Currently, the most influential and hotly debated bills are the Durbin bills, two bills sponsored by Senators Dick Durbin and Chuck Grassley – one in 2007 and another in 2009. They first introduced a bill called “The H-1B and L-1 Visa Fraud and Abuse Prevention Act of 2007” in 2007, and reintroduced a similar one in 2009 after the first failed.\textsuperscript{117} The main elements of their bills are as follows:

1. Protection of U.S. Workers

Senator Durbin and Grassley underscored several times in both of their bills and in public speaking that U.S. immigration policy should complement the U.S. workforce and not replace it. It is their vision that equally qualified native workers should not be hurt by the employment of any alien workers.\textsuperscript{118} Specifically, several suggestions were made to increase the protection of domestic workers.

(a) Good Faith Hiring Statement

Currently, only employers who hire H-1B visa holders as a large percentage of their whole workforce are required to make a good faith statement or attestation that they have attempted to find native workers before hiring a foreign one.\textsuperscript{119} Both the 2007 and 2009 Durbin bills propose that all employers in the U.S. that seek to hire an H-1B visa holder should pledge that they have made a good-faith effort to hire American workers first, to prevent U.S. workers from being displaced or potentially displaced by an H-1B visa holder.\textsuperscript{120}

(b) Prohibition of Discrimination Advertising

Both Durbin bills require that H-1B employers should not label a job as “only-H-1B” in their advertisements and position descriptions.\textsuperscript{121} Both bills require that employers post an Internet advertisement of the position with detailed information about the job for 30 days. The advertisement should include the wage, conditions of employment, education, training and experience requirements, and details of the full application process.\textsuperscript{122}

(c) Prohibition of Illegal Body Shop

The first Durbin bill incorporates a requirement that companies be prohibited from hiring H-1B employees in large numbers for training and then outsourcing them offshore.\textsuperscript{123}

(d) Set a Percentage Cap on Hiring

Both bills would prohibit companies from hiring H-1B employees if they employ more than 50 people and more than 50% of their employees are solely H-1B visa holders.\textsuperscript{124}

2. DOL Oversight and Investigative Authority

Currently, the DOL is thought to be less than sufficient in its oversight and investigative powers over the H-1B program. Based on two bills, Senator Durbin and Grassley made several relevant recommendations to increase the ability of government agencies to regulate the program.

(a) Broader Responsibilities

Both bills grant the DOL authority to conduct random audits of any company where H-1B employees work. Currently, the DOL is only allowed to review applications for completeness and obvious inaccuracies, and the Secretary is able to make cursory investigations, but Durbin and Grassley suggested widely expanding the range to include “clear indicators of fraud or misrepresentation.”\textsuperscript{125}

The second bill went even further, giving the DOL the ability to require annual compliance audits of each employer with more than 100 U.S. employees and/or where H-1B workers make up more than 15 percent of the workforce.\textsuperscript{126}

In addition to random audit authority, the second bill also requires employers to submit W-2 Forms every year for each H-1B employee to determine if there has been any fraud or misrepresentation of wages as compared to the LCAs. Also, the second bill increased related penalties for violations of the H-1B program.\textsuperscript{127}

(b) Review Time Extension

The first Durbin bill would allow the DOL to extend its review period from the current seven days to fourteen days.\textsuperscript{128}

(c) Investigation Flexibility

The second Durbin bill gives the DOL more investigation flexibility by relaxing the current requirements and expanding DOL’s authority to initiate their own investigations without a complaint and without the Secretary of Labor’s personal authorization.\textsuperscript{129}
(4) Information Sharing

The first Durbin bill would improve the oversight ability by requiring that DHS share with the DOL any information in H-1B visa applications indicating that an H-1B employer is not complying with program requirements.310

3. Wage Discrepancies

The current H-1B visa program is held responsible by critics for driving down both the wages of foreign workers, and serving as incentive for employers to displace native workers with less expensive and more manageable H-1B visa holders. To tackle these problems, the first Durbin bill makes several suggestions on wage discrepancies:

(1) Prevailing Wage

Both bills would require H-1B dependent employers to pay all employees the prevailing wage so as to avoid undercutting native workers’ wages, and to help defend the wages and rights of alien workers,33 The 2009 bill seeks to further increase the wage requirements for both H and L visa holders by requiring employers to pay “the highest of (a) the local prevailing wage for the occupation in the area of employment, (b) the median average wage for all workers in the occupation in the area of employment, and (c) the median wage for skill level 2 in the occupation found in the most recent Occupational Employment Statistics Survey.”332

(2) H-1B Workers’ Rights

The 2007 bill would increase requirements so that H-1B employees know their rights and have the ability to get their immigration documents from employers, rather than having their visa in their employers’ possession (e.g. in file cabinets with human resources).333

Though neither of the two Durbin bills was enacted as law, Senator Durbin and Grassley recently announced they were considering introducing another bill based on the 2011 GAO Immigration Policy Report.34 It is foreseeable that issues such as protection of domestic workers, application procedures, and fraud detection will still be on the agenda in future Durbin/Grassley legislative attempts.

Recommendations on Legislation

It has been generally acknowledged that there are multiple loopholes and generally poor enforcement in the H-1B visa program that undermine the original intent of the visa program. As for the fraud and abuse issues, though employers are required to target domestic workers before hiring any foreigners, there is no labor test or any audit process to check for abuses.335 Thus, based on an extensive analysis of current bills with respect to the H-1B visa program, it appears that a legislative reform on enforcement policy will serve to improve the whole system.

Expansion of Department of Labor Investigative and Enforcement Authorities

Firstly, we agree with the recommendations made in the Durbin bill that the DOL should be given more authority in terms of investigation and enforcement. This appears to be almost a common sense change. More flexibility in reviewing applications and initiating investigations will help to protect domestic workers from an influx of underpaid foreign workers and would ensure compliance in wage requirements for foreign workers.

Creation of Information-Sharing System for Government Agencies

Secondly, as discussed later in the report, an information-sharing system between DOL, DHS, USCIS, and DOS should be constructed to strengthen the program. The information-sharing system will give the three government agencies access to previous compliance data of H-1B employers, detailed application data, as well as information received from whistle blowers. This information-sharing system can be set up by Congress and run independently.

Creation of Incentive Measures to Deter Violations

Other than a restricted penalty system along with higher fines imposed on detected violations, an incentive mechanism can also be set up to improve the function of the H-1B program. H-1B employers that engage in good faith hiring practices as determined by relevant information from the information-sharing data system can be rewarded by receiving more H-1B visas under the quota cap.

Addition of Filing Requirements

Also, post-recruitment filing requirements can be added. To address the uncovered abuses such as displacement of H-1B workers, H-1B employers could be required to fill out a post-recruitment form for authorities so that the effects of the H-1B visa
program on H-1B workers and domestic workers can be measured. For example, annually, H-1B employers could be asked to fill out a post-recruitment with their H-1B visa employees’ information, such as employment time, current positions, work locations, and financial compensations, for authorities’ review. This method can be combined with the information sharing system to keep the data updated. It can also function as a documented evidence for field inspection as well as a useful procedure to prevent potential abuses.

Expansion of Investigations into the Workplace

To tackle the uncovering of fraud and abuse in the program, enforcement should not only be taken on the desk, but also in the field. For example, on-site inspections can also be incorporated into legislation. Officials should have the right to make site visits to verify H-1B applications and ensure against fraud and abuse possibilities. Consequently, this legislation should permit relevant authorities to increase their workforce.

Concurrent Reform in the L-1 Visa Program

Finally, along with the H-1B visa reform, we note that experts have held that under current law, the H-1B visa reformation is closely linked with the L-1 visa program. Currently, employers can use the L-1 visa to evade restrictions on the H-1B visa as the L-1 program does not have an annual cap and does not address protections for U.S. workers. Thus, we suggest the legislative changes on H-1B and L-1 visa programs should be made at the same time so as to ensure that the two programs are both comparable yet capable of coexisting.

Auction Systems

One of the H-1B visa program’s major points of contention, the visa cap arbitrarily set by the Congress, stems from the fact that there is no valid, reliable test to determine the labor market demand for highly skilled technical employees. As a result, there is no rationale by which political bodies set the annual visa cap. The number of applications submitted since FY 2004 suggest that the current visa cap is lower than actual labor market demand for H-1B visa workers. Not only has the cap been consistently reached shortly after the beginning of the window set annually by the DOL to accept applications, but employers state that they still have a need for labor in science and technology fields despite the fact that STEM-related workers account for over 60 percent of H-1B visas. Auction systems have been suggested as proxies for labor market demand to ground this decision in an explicit and rational method.

Per the client’s request, we have evaluated three auction systems: an employer-based auction system based on Orrenius and Zavodny’s model, and two employee-based auction systems based on discourse within the field. Orrenius and Zavodny’s model, as an auction model for specialty temporary work visas (rather than for seasonal and interchangeable worker visas), was a relevant model. The employee-driven models and their respective core concepts were derived from client meetings. The team elaborated on the core concepts to provide more detail on how such a system could be implemented and analyzed the resulting employee-driven auction systems. Other auction system models exist in the literature, and further, deeper research is warranted in this region.

Employer-based Auction System

In their book Beside the Golden Door: U.S. Immigration Reform in a New Era of Globalization published by the American Enterprise Institute, economists Pia Orrenius of the Federal Reserve Bank of Dallas and Madeline Zavodny of Agnes Scott College in Decatur, Georgia propose an auction system as a replacement for the current immigration system in the U.S..

Currently in the U.S., 16 percent of green cards authorizing permanent residence are granted for employment purposes, 63 percent for family reunification, and most of the rest for refugees or through the diversity lottery. The proposed auction system seeks to prioritize employment-based
immigration over family reunification in the U.S. and include visa caps that adjust to the growing economy.

Under the auction system as proposed by Orrenius and Zavodny, employees would enter the U.S. on a five-year provisional work visa that an employer who commits to hiring them has explicitly purchased. If they were to no longer work for the employer, then the worker can move to other employers, but only to those who also have valid, open work visas. Conversely, employers may hire other employees to fill a visa that was previously used by an ex-employee who has moved on. Essentially, these types of visas as described by Orrenius and Zavodny are “space-holder” visas rather than specific to explicit employers and explicit employees, a type of work, or a skill level. Employees would be allowed to eventually apply for a green card and citizenship without having to wait in a queue as is currently the case.¹⁴²

Orrenius and Zavodny suggest that visas start at minimum (reservation) prices of $10,000 for high-skilled workers (H-1B), $6,000 for low-skilled workers (H-2A), and $2,000 for seasonal workers (H-2B).¹⁴³ The number of permits offered at government auctions, the ‘visa cap’ in this model, would be determined by an independent organization based on employer demand as determined by bid prices; high prices signal to the government that more permits should be available and low prices, fewer.¹⁴⁴ The federal government would determine the initial quantity of permits available and at what target price range.¹⁴⁵

Auctions for such visas would be held by the government four times a year, and bought and sold year-round in an employer-driven secondary market. Orrenius and Zavodny suggest that bids be submitted through a sealed-bid, single price format. Employers submit a confidential, one-time bid that includes the number of visas they would like as well as the price they are willing to pay per visa. Based on the pre-set cap by either the federal government or an independent organization, employers would all pay the same, lowest bid price.¹⁴⁶ After employers obtain permits, employees are screened and verified by the DOS, just as they are under the current application process, through consular interviews with the U.S. embassy or consulate in their home country.

In analyzing Orrenius and Zavodny’s auction model with respect to the H-1B system, it is important to note that the auction system is only studied as far as its ability to serve as a proxy for labor market demand as a part of the application process for specialty occupation visas, rather than a replacement for general immigration or even skilled labor¹⁴⁷ immigration to the U.S.. When incorporated into the H-1B visa program, H-1B visas would be sold at a government-hosted auction four times a year, with a secondary market for employers to trade visas that have not yet expired. So instead of applying to DOL, DHS, and DOS for work visas as detailed earlier in the literature review, employers would bid on 5-year temporary work visas from the government at quarterly auctions or purchase non-expired visas from other employers who no longer want or need them. As in the auction model, these visas would no longer be mutually exclusive, but stay with the employer. Similar to the current H-1B visa program, the employer-driven auction system will exempt H-1B workers for public/non-profit and other organizations from the visa cap (e.g. workers with doctorates, non-profit organizations, etc).¹⁴⁸

Analysis

Zavodny asserts that “[a]uction system would maximize immigration’s benefits to the U.S. economy. ...[A]uctioning off provisional work visas for skilled and unskilled workers would ensure that employers are able to bring in the workers who will add the most to the U.S. economy. And the revenue from the auctions can be used to help offset any costs immigration creates.”¹⁴⁹ These costs include the cost of creating such an auction system, administration and regulation costs, and potentially even tax subsidies for areas where H-1B workers are employed. As stated by Zavodny, auction systems are appealing in that they help ensure that employers are using time, money, and other resources to hire workers, making it more likely for employers to pursue the most sought after employees and pay premiums for them, or avoid such costs altogether and seek alternatives through the domestic labor market. In an auction system, market forces should naturally set a visa cap and prevailing wage for H-1B workers. An analysis of the auction system shows that it is more difficult to execute than it initially seems. The auction system has open-ended visas as well as a lack of regulation and structure, making the suggested method of reform highly susceptible to fraud.

One of the key characteristics of Orrenius and
Zavodny’s proposed auction system is that it would sell 5-year temporary work visas that would not be employer-employee exclusive. These visas are tied to employers, meaning that employers own the employment visa and may hire another employee if an H-1B worker is fired or leaves while the H-1B workers who were previously associated with the visa are able to move to another employer that also owns an employment visa. Orrenius and Zavodny suggest a three-month grace period for employees to find employment with employers who own specialty occupation visas. Currently, legislation allows for foreign workers with work visas into the U.S., but does not detail what occurs if a foreign worker no longer has a visa. The lack of specificity in legislation and regulations implies that employees are by default, expected to leave the U.S. immediately. This means that employees who are no longer employed by their exclusive employer are expected to immediately leave the U.S.

The mobility of auction workers provides them with increased security and flexibility to move between different jobs and has two different potential effects on the labor market. First, the increased security and flexibility decreases the leverage employers have in foreign worker salary negotiations, and indirectly in domestic worker salary negotiations. Less employer leverage leads to stabilizing or upward pressure on the salary and working conditions of domestic labor. Also, the mobility of auction system employees and the ability of other employers to attract carefully-selected talent away may counter these adverse effects; risk-averse employers are discouraged from applying for H-1B visa workers and less willing to pay, to the favor of domestic workers. At the same time, worker mobility between open, non-defined specialty occupation visas permits H-1B workers to compete with domestic labor and apply for jobs they were not originally intended to have at the time of entry. This increases labor competition for domestic workers and leads to adverse effects on domestic workers in direct contradiction of the visa program’s legislative limitation.

There is a lack of regulation and structure in the auction system. Under this system, after employers bid at auction and pay a premium for workers, there is no system in place to keep them from underpaying employees for five years thereafter to recoup the cost of the visa. Orrenius and Zavodny admit that “foreign workers likely have relatively inelastic labor supply, meaning their willingness to work is not very sensitive to changes in wages, under [their] plan [worker] earnings will absorb some or even most of the cost of the permit.” There is no reporting mechanism or regulating agency body that is responsible for holding employers accountable and making sure employees are being paid a prevailing wage. Further, there is no labor conditional agreement with an agreed-upon prevailing wage to use as a benchmark to constrain H-1B worker abuse. This allows for employers to use the auction system as a source of cheap labor, and leads to an adverse impact on the labor demand of domestic workers.

The open-ended nature of the auction visas, coupled with the lack of regulation and structure of the auction system, make the auction system susceptible to many violations and fraud. Those who wish to immigrate to the U.S. could take advantage of the “blank check” visa and attempt to buy their way into the country through false corporations who acquire worker visas. Since H-1B visas would no longer be employer-employee exclusive, the program’s purpose of bringing in talent to address a specific unmet need in the U.S. labor market may be undermined because workers who come into one industry can leave their employers for those in a different industry. To prevent and minimize fraud, the auction system should set specific visa restrictions.

From the literature, it is unclear whether the auction system would fulfill the purpose of the H-1B visa program which seeks to fill an unmet labor need in the U.S. without having adverse effects on domestic labor. On one hand, employers may choose to develop domestic talent as an alternative rather than pay a higher price for an immigrant worker, resulting in a positive effect on the domestic labor market. On the other hand, employers may enjoy a lower cost of labor either as a result of a lack of government regulation or through lower market auction price of “risky” visas, resulting in a negative effect on the domestic labor market. Further, employees may change jobs and not actually fill the talent gap they were recruited to fill. It is not apparent whether the effects will balance each other out over time or if one will dominate over
the other in promoting the purpose of the H-1B visa program. More research or a detailed proposal would be needed to resolve these open questions.

As for whether the auction system is an effective proxy for labor market demand, this employer-based auction system meets several elements of a successful labor market test. Zavodny admits that the suggested auction system may be radical, but argues that it “would go a long way toward fixing the broken current system.”

The employer-driven auction system provides a needed rationale and method for determining the visa cap that is based on economic principles and direct quantitative data from government auctions. As with any other system, the auction system has shortcomings. Some of these can be minimized or negated through modifications or through the clearinghouse and proposed legislation. Other shortcomings are trade-offs of using this program.

**Recommendations**

With a few modifications in the form of increased regulation, visa restrictions, and a different auction platform, the auction system could be viable as a potential, effective proxy for labor market demand. Regulations that place restrictions on visas can manage or prevent negative effects of the auction system on the domestic labor market and incidents of fraud. An internet auction platform can better facilitate quarterly auctions for more accurate visa cap setting and more efficient application administration.

The auction system should regulate the wages of H-1B workers such that employers are not able to pay a one-time premium for the visa and then lower wages for five years thereafter. Instead of using random audits with penalties for violators and tax forms to identify and separate low- and high-skill workers, Orrenius and Zavodny could use such regulation methods to regulate the wages of H-1B workers against weighted average incomes as detailed by NAICS. Additionally, the auction visas should have explicit restrictions: visas should either be restricted by industry or job type, or exclusive to a particular employer-employee pair to prevent the abuse of specialty visas as “blank checks” for immigration to the U.S.

The auction system should be in the form of a real-time, online auction platform (similar to that of eBay). Employers would register and be approved to receive a unique ID to log in to the online system and bid on H-1B visas. While the visa cap and reservation price would have to be set somewhat arbitrarily at the first online auction, the data from all auctions will not only provide real-time, responsive data for more accurate numbers on employer willingness to pay, but also inform future decisions on visa caps and reservation prices. Additionally, the online auction platform will create an electronic record of all bids, their amounts, and by which employer and industry, increasing efficiency by reducing paperwork and avoiding human error in data entry.

The federal government can continue with the current application process and H-1B visa program administration while gathering more information about the auction system through a pilot. We suggest that the federal government set aside a small amount of visas for pilot auctions, (e.g. 5,000 of the annual 65,000) selling 2,500 visas at each. Based on analyses of data from pilot auctions and the system in general, additional pilots could be held to gather more information, the auction system could be implemented, or the auction system could be set aside. It is important to note that if an auction system were to be implemented, then an all-or-nothing approach should be taken; the auction system should either be implemented with all visa restrictions, increased regulations, and as an online platform or not at all. Otherwise, the piecemeal implementation of the auction system may create more problems than it addresses.

**Employee-based Auction System**

A look at two constructed employee-based auction systems provides contrast to Orrenius and Zavodny’s employer-based auction system. The first employee-based auction system is similar to the employer-based auction system proposed by Orrenius and Zavodny’s employer-based auction system. The first employee-based auction system is similar to the employer-based auction system proposed by Orrenius and Zavodny. Employers would bid at quarterly, government-hosted auctions for five-year temporary work visas, and trade in secondary markets. The difference however, is that the employment visa, though still a product of the employer’s effort and money, would stay with the employee. If an employee left a firm, the employee rather than the company owns the visa. In the second employee-based auction system, employers submit employee wages as bids rather than prices of specialty occupation visas. Employers who offer the highest wages receive H-1B visa workers.

**Analysis/Recommendation**

The first employee-based auction system is identical
to the employer-based auction system except in one respect: in the event that an employee is fired or leaves an employer, the employment visa remains with the worker, who is free to find employment with other employers. If a visa is tied to employees, then employees are free to leave their job for another in a field other than their specialty, and employers no longer need a work visa to establish a job or “space” for each foreign worker. This gives employers and foreign workers more latitude than exists under both the current H-1B visa program and the employer-based auction system in terms of the “specialty” aspect of the H-1B visa and the number of workers allowed for a single employer.

The decreased restrictions of the temporary worker visa and change in visa ownership gives workers more mobility, security, and flexibility with respect to jobs, industries, and employers. Compared to the employer-based auction system, the labor supply of foreign workers in this model is less inelastic and less restricted because employees are free to go to all firms rather than only those with an available visa “space” and to all jobs because visas are not restricted by job or industry. As was the case with the employer-based auction system, such mobility would put upward pressure on the wages and working conditions of domestic workers by decreasing employer negotiation leverage. However, this is countered by the increased hiring ability of employers. Since employers are not limited to a certain number of foreign workers determined by how many visas they own, employers may hire as they usually would based on standard selection criteria without restrictions to specific jobs or on numbers of foreign hires. This enables foreign workers to compete directly with domestic labor in all industries and directly contradicts both the H-1B visa program’s purpose of filling a shortage in labor and limitation that incoming labor not adversely affect the domestic labor market. Ultimately, the employee-based auction system reduces the visa program to an employment program as foreign workers are substitutable for domestic workers and visas play a de facto role of working papers.

To curtail competition between foreign and domestic labor, restrictions can be placed on the visas so that visa workers are limited to certain industries and jobs where talent gaps exist. However, the nature of the program’s visa ownership preserves employee mobility. As a result, two things can happen. First, employers who pay premiums to hire H-1B workers risk having employees leave for another employer after arriving, defeating the employer’s goal of hiring foreign labor to fill a gap in talent. Employers would be less willing to pay or refuse to participate in the auction systems; lower willingness to pay drives the cost of the H-1B visa program for those who participate and refusal to participate may actually encourage employers to make efforts to attract talent away from other employers rather than bidding at auction. While it is possible to have changing employers of the same employee pay a pro-rated fee for the employee’s visa, the costs of attracting, recruiting, and training a new employee would prevent this from curbing the problems associated with the employee-based auction system. Second, as a result of lower costs, employers may be attracted to the H-1B visa system as a source of low cost labor, driving the cost of visas back up. These two effects may balance each other out over time, or one effect may be stronger than the other. Due to a lack of literature and history, it is not apparent whether this employee-based system would provide the most accurate data to support a rationale and method for determining the visa cap and reservation price; it is not clear whether this auction system would be an effective proxy for labor market demand and more research should be conducted before formulating and launching a pilot program.

The second employee-based auction system is different from the two previous models in that employers offer wages as bids for employees rather than prices for temporary worker visas. We suggest that the bidding start at weighted averages as determined by OES and increase from there. Employers with the highest bids up to the visa cap will receive H-1B workers. The federal government can ensure that employers pay the wages offered at auctions through tax forms or pay stubs. This system provides increased protection for foreign employees and may have a positive effect on market wages, but would be difficult to implement and would probably be a topic of ethical debate.

The establishment of OES weighted averages as starting bid prices for employees provides protection to foreign workers and has a positive effect on both foreign and domestic labor. It reduces the potential for employers to pay foreign workers less than the market prevailing wage and thus prevents employers from using foreign workers as a source of cheap foreign labor. In addition to protecting foreign workers, this auction system also makes foreign workers relatively less attractive than they were previously, thereby lowering the leverage of employers in negotiations with domestic workers. This feature of the auction
Having an employee-based auction system that specifies the employee to be auctioned beforehand requires that the auction be structured one of two ways. Under both systems, employers would have to first recruit, identify, and select specific individuals for the auction block. Employers have to select employees for the auction block because only they can identify unmet needs in their labor supply and know which gaps they are willing to fill with what types of employees. To avoid extraneous employee nominations, employers should be required to bid on all employees they nominate. Then, the federal government needs to compile a single list of workers who will be available at auction and host individual auctions for each of the workers on the list. After this list is compiled, this auction system could proceed in one of two ways. In one, the number of employees auctioned (and therefore the number of auctions that occur) should be higher than the visa cap number. At each of these auctions, one or more employers bid simultaneously for the specific employee in their auction and employers that bid the highest wages across all auctions will receive worker visas up to the visa cap. In the other, the number of employees auctioned would be at exactly the visa cap number and more than one employer should be required to bid at each auction. Employers who bid the highest at each auction will receive a worker visa for the auctioned employee.

The first way this auction system could proceed is ultimately the same as if employees were not specified and is subject to the same analysis and recommendation. In the second way this auction system (wages) could proceed, the choice of employees is made by the federal government before the auctions begin, as those are the employees who will receive worker visas. The government would need to put together a pool of employees who would each be attractive to several employers and collectively be representative of the needs of the market in terms of the inclusion and distribution of jobs and industries. The elements of this auction system overall negatively impact employer participation and increase administration costs to the federal government because of how the pool of auctioned employees is created and the high cost of organizing auctions. Since employers have to provide the pool of auctioned employees, they have little incentive to participate because they risk being priced out after investing resources on recruiting and selecting employees, subsequently losing recruited workers to other
employers at auctions. The benefits to employers of recruiting, selecting, and placing an employee in the auction pool may be outweighed by time, money, effort, and uncertainty costs. There is little incentive for employers to recruit employees for this employee-based auction because if employers know that their pre-selections are open to being taken by another employer, they may not engage in recruitment of foreign labor at all. The administration costs of this auction system are high: under the current visa cap, there would be at least 65,000 auctions in which employers bid for employees, each of which would have several employers to drive the auction. The government would have to compile a collection of postings detailing skills and other characteristics of employees in the auction pool, publish, and distribute it to employers. After that, the government would have to host 65,000 consular interviews and host simultaneous, individual auctions. The scale of this auction system is much larger than the current and other suggested systems and would cost more to administer. In an attempt to address the enormity of this operation, the visas could be grouped by industry or job type to condense the auctions held. However, this brings back the initial problem that employers are not willing to bid premium wages for an employee of unknown skills and qualifications.

In addition to structural implementation-based reasons, this employee-based auction system may not be feasible because of arguments that may enter academic discourse over ethical issues over bidding directly for individuals. Such arguments stem from placing a value directly on foreign employees through wages rather than on the right to work through visas. Lobbyists may oppose how the auction system is structured in that employers place employees that they want to hire on an auction block and “win” an employee through such a process. The counterargument is that workers have a choice as to whether they are participating in a labor market where they are being compensated for their skills and qualifications. However, the ethical issue that arises may not be one that can be surmounted, especially in the legislative arena, once it is raised. This must be considered carefully before action is pursued.

Under this employee-based auction system, reduced employer participation and higher government costs make domestic labor more attractive and have a positive effect on U.S. workers. However, lower employer participation means that the wages bid in auctions will be lower and as a result pull employers back to the visa program to the disadvantage of domestic labor. It is unclear which effect will dominate over the other. Given the dramatic change that this employee-based auction system is from the status quo, the uncertainty of its implementation feasibility and ethical issues of this employee-based auction system, this would not be an effective proxy for labor demand. We recommend that further research be conducted on alternatives.
Tri-department Clearinghouse

Analysis

An analysis of the H-1B program shows that the existing application system has several flaws in its structure and process, documentation, and application tracking. Most specifically, the application process is de-centralized and non-transparent, collects incomplete, inaccurate, and/or missing data about applicants and visa holders, and is susceptible to fraud.

An application for an H-1B visa may begin after an employer has identified a labor need and advertised the position and employers submit an LCA to Labor. If the LCA is approved, employers submit Immigration Form I-129 to the DHS for approval. After that, the LCA and I-129 are sent to the DOS for eligibility verification overseas. Finally, the worker is responsible for meeting with the U.S. embassy or consulate for an interview. Barring issues that arise as a result of agency checks and the interview, a visa is processed and issued to the worker. At the border control station where workers enter the U.S., DHS agents have the ability to reject a worker entry into the U.S..

Lack of Transparency

The first problem in the application system is the current structure; it is a non-transparent process that is administered separately by the DOL, DHS, and the DOS. An H-1B visa application moves through three government agencies that have neither formalized avenues of communication nor a centralized body to coordinate their efforts. This de-centralization promotes silos that hold partial and different information in each department, providing three different sets of incomplete data for the purposes of administering the overall H-1B visa program. This is inherently counterproductive.

Additionally, the lack of a centralized body to unify DOL, DHS, and DOS application review processes makes the approval process non-universal and non-transparent. As it stands now, each agency has a different process for approving applications, yet relies on and trusts (improperly) information from prior agencies. When an employer submits an LCA to the DOL, application reviewers in ETA do not have a list of jobs and their corresponding prevailing wages. Instead, the ETA relies on the employer's assertions and approves the LCA if there are no obvious errors (e.g. mismatched numbers). When an employer submits the approved LCA along with an I-129 to DHS, the USCIS relies on information in the LCA to determine if the two documents are consistent and whether all H-1B visa requirements are fulfilled. By the third step, DOS agents at the U.S. consulate or embassy interview H-1B applicants based on information from LCAs, I-129 forms, and U.S. databases. At the border control station, a DHS agent may still keep an approved H-1B worker from entering the U.S..

The lack of transparency and de-centralization of the application process give rise to several potential problems; this system separates information so that it is more difficult to enforce the payment of prevailing wages and prevent fraud; it is an inefficient use of government resources, and allows for agencies to rely on inaccurate information. Employers can take advantage of the information gap and offer lower than the actual prevailing wage. As a result, H-1B workers may be treated as a cheap source of international labor, adversely impacting domestic workers; and the application process may be viewed as unfair, decreasing the legitimacy of the program.

Documentation and Data Collection

Data collected about applicants and visa holders through the application process by the DOL, DHS, and DOS is incomplete, inaccurate, and/or absent. This set of data does not provide a comprehensive and accurate description of the existing, incoming, and prospective H-1B visa populations. Consequently, we cannot use this information to validly assess the market demand for H-1B visas (i.e. what the quota should be), identify which industries have the largest need for H-1B workers, or otherwise inform policy for the future of the H-1B visa program.

The way DOL currently accepts H-1B visa applications provides an incomprehensive collection of data on prospective H-1B workers because it does not accept applications from all who want to apply. In practice, employers who apply for H-1B visa workers must submit applications during a specified period of time. For fiscal year 2011 (visa period starting October 1, 2011 and running through September 30, 2012), applications were accepted after April 1, 2010, and the cap was reached on January 26, 2011. After the DOL approved 65,000 workers, the maximum number, it sent all subsequent applications back to employers.
without tracking the number of applications submitted after the cap, and did not track the industries, types of jobs, or any other identifying characteristics. As a result, researchers only have a partial set of data that is not valid and reliable.

DOL’s lack of a universal application review process allows for submitted applications to contain inaccurate information and to be approved based on such information. The main area of contention is the prevailing wage of H-1B employees. Under the Immigration Naturalization Act and later statutes, for a given profession, industry, and region, there are several existing methods to estimate the local market wages (or prevailing wage). These methods include previously negotiated collective bargaining agreements, employer-provided surveys of local firms in an employer’s respective industry, and wage levels by profession determined by the BLS through its OES program. However, these methods, especially employer-provided surveys, allow for employers to choose the lowest wage of the three methods as a prevailing wage and do not reliably predict the local market wage. As a result, H-1B workers can be paid less than domestic workers, adversely affecting both their employment and wages.\textsuperscript{53}

This inaccurate information is not only accepted and used to approve H-1B workers and their wages, but also serves as source information for future applicants to use as a benchmark for what prevailing wages are, creating a cycle in which downward pressure is placed on wages of domestic workers.

Though there are three different government agencies collecting information on the H-1B applicant and worker population, it does not provide a comprehensive and accurate account for program evaluation and analysis. Currently, a concordance of all available data on the H-1B population yields 94 identifying characteristics about the tracked H-1B applicants and approved workers. (See Appendix I for a full list). However, there is a lack of micro-data on “wages and job descriptions broken down by employer” at the petition level.\textsuperscript{54} Additional and more specific data is needed to accurately depict and make statistically significant extrapolations about the visa program.

### Potential for Fraud

The current structure and administration of the H-1B application process, more specifically the fragmentation of the application process into different methods through three different agencies coupled with the incomplete, inaccurate, and missing information about the population, leaves the program susceptible to fraud. After the application process, there is little information available about H-1B workers and the conditions they face from the time they actually enter the U.S. to the time they leave or seek permanent residence; there is no regulating body that ensures fair treatment of H-1B workers and prevents domestic workers from suffering adverse effects. This allows for applications to be improperly approved, workers to be paid less than the actual prevailing wage and/or classified under lower-paid pay grades, and employers to deviate from the terms of their respective LCAs after applications are approved and while workers are in the U.S. The 2008 DHS study described in the literature review above is evidence that the potential for fraud has been realized, directly contravening the purpose of the H-1B program.

### Recommendation

#### Purpose and Expected Benefits

We recommend an inter-departmental data clearinghouse as a way to address the program’s issues with the application process, documentation, and susceptibility to fraud. The clearinghouse will restructure the current application system so as to unify and regulate the process, identify, collect, and aggregate relevant information in one place, and minimize potential for fraud both during the application process and the duration of an H-1B visa. The principal expected benefits of the data clearinghouse we propose are:

- Improved accuracy of the estimates of H-1B workers’ effects on labor market demand, wages, productivity, and related empirical research topics
- Expanded and easy access to comprehensive and detailed H-1B population data by stakeholders in government, labor organizations, business organizations, immigration organizations, and academic institutions
- Availability of additional tools to not only identify and investigate fraud in the H-1B program, but also to enable agencies to develop more proactive measures to prevent fraudulent or unfair practices\textsuperscript{55}
The ability to enable stakeholders in the business community, labor, government, the general public, and elsewhere to develop metrics that:

- Evaluate the program’s effectiveness in meeting its statutorily mandated goal of addressing labor market shortages through the importation of foreign skilled labor and/or in serving the needs/interests of specific stakeholder groups
- Identify more precise ways of improving or reforming the H-1B visa program after developing a clearer picture of the effects that the H-1B program actually has on local and national economies
- Assist in the development of immigration policy dialogues that are driven by empirical evidence and objectively verifiable economic conditions as well as less tangible metrics.

**Structure**

The tri-department clearinghouse (clearinghouse) will have, as part of its structure: (1) a unique identifier for each individual person that seeks to enter the U.S. on an H-1B visa; (2) standardized job and industry titles with corresponding descriptions across the three government agencies involved in the H-1B program; (3) increased disaggregation in the way data is reported and published; (4) a system of annual wage and hour reports by employers to the DOL’s Employment and Training Administration; (5) real-time, tri-department access to periodic department updates; and (6) an annual publication of inter-department micro-data.

The first element of the clearinghouse is a unique identifier for each individual person that seeks to enter the U.S. on an H-1B visa. Each application will create a unique identifier for the application process so that applicants may be tracked as they are accepted or rejected at the LCA, USCIS petition, and DOS interview stages of the application process. H-1B applicants will continue to use this unique identifier if they are approved and enter the U.S. so that agencies can better coordinate amongst themselves and ease the complex task of tracking H-1B holders over time after they enter the U.S. The inclusion of data on those employees who are rejected at all stages into the data system is important so as not to exclude valuable data about the overall numbers of firms and applicants attempting to participate in the program.

The second element of the clearinghouse is standardized job and industry titles with corresponding descriptions across agencies involved in the H-1B program. The three agencies currently base their job titles and definitions on the Standard and Occupational Classification (SOC) system. The SOC codes concord perfectly with BLS’s exhaustive, nationwide data on compensation by profession. Additionally, the three agencies use the industry titles and descriptions set forth by the North American Industrial Classification System (NAICS). The NAICS codes concord perfectly with nationwide data on employment, output, shipments, and related measures collected by the Census Bureau, the most exhaustive industry level data. This element seeks to expand and institutionalize the usage of these standardized codes to make data compilation and comparison less difficult.

The third element of the clearinghouse is to increasingly disaggregate reported and published data to the extent possible in the form of micro-data, as opposed to summary statistics. In addition to what is already collected by the DOL, DHS, and DOS (as listed in Appendix I), the clearinghouse should collect data wherever possible:

- At higher digit SOC and NAICS to narrow in on specific professions and industry subsections
- On OES prevailing wage estimates at the state or city level rather than the national level
- On firm size (by market share and number of workers employed) and on the percentage of workers employed on-site that are H-1B workers

On the number of years of prior experience and highest education level that prospective or current H-1B workers possess, as well as other relevant data to control for skill levels and human capital to improve the accuracy of estimates of the effects of the H-1B program on domestic labor markets.

The fourth element of the clearinghouse is a system of annual wage and hour reports by employers to the ETA in DOL. Each year, employers should submit a report of compensation paid to H-1B workers (with corresponding unique identifiers) and an estimate of the number of hours worked each year by each H-1B employee. The clearinghouse should add this
information to the information gathered through the LCA, USCIS petition, and visa interview phases of the application process to create a time series for each H-1B worker.

The fifth element of the clearinghouse is a centralized data system that provides real-time, tri-department access to periodic department updates by all three agencies. This allows for the various agencies of the H-1B program to provide updated information to each other on a regular basis (at least as often as two times each year) through a readily accessible resource. Once established, the clearinghouse can be maintained by a single, appointed department such as the ETA or USCIS that is responsible for the management and maintenance of the website. The department will receive, and update on the website, sorted and standardized data from all the other H-1B agencies. Data will be sorted by standardized SOC, NAICS, and unique individual identifiers.

The sixth and final element of the clearinghouse is an annual publication of inter-department micro-data that is gathered by the clearinghouse in a manner similar to that of LCA micro-data. If making all of this micro-data publicly available is too cost-prohibitive or seen as a violation of privacy for workers and/or firms participating in the H-1B program, universities, non-profits, labor groups, and industry groups could off-set the cost by purchasing the data on an annual basis, as with Census Bureau data. If, even when allowing the micro-data to be purchased, the cost is still prohibitive (in terms of work hours at the agency), then the clearinghouse can publish annual summary statistics of this more precise and informative sample as the USCIS does in its annual “Characteristics of H-1B Specialty Occupation Workers.” (Appendix II)

**Limitations of the Clearinghouse**

Limitations of the clearinghouse include time and money costs, logistics and expertise, initial comprehensiveness, political limitations, and privacy concerns.

A clearinghouse system would require more staff hours at a time when many departments and agencies face tight budgetary constraints. It is difficult to estimate how long it would take to create such a system that the DOL, DHS, and DOS could easily update in a periodic fashion and access in real time. It is also difficult for our team to estimate how expensive it would be for firms to comply with the new reporting requirements, agencies to collect and analyze the new data from firms, and to compile and publish new micro-data and summary statistics. Also, it is difficult to estimate how costs for creating and maintaining the clearinghouse system would be spread between employer application fees and agency budget(s).

Logistically, the initial creation of such a system will require staff with expertise in specific analytical aspects of the H-1B program such as reviewing wage requirements, reviewing petitions, tracking entry/exit into the country, etc. These experts should be detailed to a single department to increase the efficiency of the program’s implementation. As with the implementation of any new data system, there will be a transition period. Until the clearinghouse is up and running, there are timing and coordination problems involved with creating a multi-office-and-department detail. For example, the existing agency data systems cannot easily be linked to one another, as noted by the GAO. The creation of the clearinghouse, initially, would not be directly comparable to the agencies’ existing, unconnected data systems despite its superior accuracy and exhaustiveness.

The clearinghouse system is forward-looking since it will be very difficult to collect data from the past. The clearinghouse will not be able to improve the ability of the three agencies to track and gather data about individuals already in the country prior to its creation since they never received a unique identifier. As a result, the system would not be able to achieve its objectives of delivering accurate, descriptive characteristics of the H-1B population and minimize the incidence of fraudulent practices until as long as 6 years after the clearinghouse is implemented, or as long as a full cycle takes for a group of H-1B employees to enter and leave the U.S. Even then, it could prove to be very difficult to integrate non-immigrant H-1B holders that entered the country before the clearinghouse was created.

The clearinghouse may be limited due to limits on the authority and scope of review of the DOL, DHS, and DOS as designated by statute. In particular, such a clearinghouse will be impossible without specific statutory authority and appropriations provided to each named department. As this would constitute a brand new program, approval would need to come from Congress in order to open the clearinghouse. It is possible that this recommendation could be made budget neutral if monies could be transferred from the various departments to create the clearinghouse.
rather than requiring additional appropriations. Such a transfer will still require Congressional authority under Article I, Section 9 of the Constitution.

The clearinghouse may also be limited by privacy concerns of employees and the firms to which they belong. The system will have to balance the privacy of employment information against the program’s transparency and accountability. It is not obvious what level of scrutiny firms and employees should be expected to receive when agencies set new reporting and recordkeeping requirements. Various stakeholders in the H-1B program will need to determine the appropriate balance of reducing fraudulent practices and technical violations while greatly expanding the availability of information about the population of H-1B workers. Additionally, any regulatory changes would have to be made through the normal processes of agency rule-making that requires a notice of the proposed regulation, allows for comment by stakeholders, and promulgates the regulation along with a statement of basis and purpose.

**Recommendations**

**Legislation**

Based on our analysis of the current bills with respect to the H-1B visa program, the project team believes that legislative reform tailored towards enforcement policy will serve to improve the whole system. Therefore, we recommend the following:

1. **Give more statutory authority to the Department of Labor** in terms of investigation and enforcement. Permit more flexibility in reviewing applications and initiating investigations, through allowing actions such as conducting annual audits, extending the review time, and eliminating permission requirement, should be ensured in a legislative form.

To build an information-sharing system to strengthen enforcement. In the information-sharing system, previous compliance data of H-1B employers, detailed application data, as well as information from whistle blowers should be accessible to all three government agencies. This information-sharing system can be set up by Congress and run independently.

To set up an incentive mechanism to improve the function of the H-1B program. In this mechanism, H-1B employers who engage in good faith hiring practices, as determined by relevant information from the information-sharing data system, can be rewarded by receiving more H-1B visas under the quota cap.

To establish a post-recruitment reporting system where H-1B employers are required to fill out a post-recruitment form for government agencies to uncover and track abuses such as displacement of H-1B workers.

We also noted that many experts hold that under current law, H-1B visa reformation should be closely linked with the L-1 visa program. Employers can currently use the L-1 visa to evade restrictions on the H-1B visa because the L-1 program does not have an annual cap and does not address protections for U.S. workers. Therefore, we suggest that legislative changes for the H-1B and L-1 visa programs be made at the same time.

**Auction System**

Given that our analysis of both the employee and employer driven system was inconclusive we
recommend that the DOL, DHS, and DOS jointly conduct further research through a pilot program as well as look at other models. We acknowledge that our philosophy is to experiment on the margins without destroying the existing mechanisms for allocating visas until we have more information on whether a replacement system would improve outcomes for domestic and foreign workers. Our recommendations for an auction system are as following:

To launch a pilot program of an employer-driven auction system in which employers compete for 5,000 five-year temporary work visas after the LCA stage of the application process and after the petition stage to the USCIS, but before applicant has had opportunity to interview the state department. The visa cap would stay at 65,000 for FY2012 and the remaining 60,000 visas would be distributed under the current visa program. We recommend that the current visa program be kept largely in place for the foreseeable future as additional pilot programs are launched. We recommend that data from the pilot program be used to evaluate the effectiveness of this auction system as a proxy for labor market demand by testing the auction system’s ability to accurately measure market signals as well as to evaluate the program’s effectiveness at improving the efficiency or fairness of the program.

To further study both employee-based systems in which employees own employer-paid visas and employers bid wages on specific and non-specific employees. This information can be used to either eliminate the employee-based systems or to modify system elements for a future pilot program.

To fund further analysis into studying the outcomes of each system and also explore other methods of rationing or apportioning visas each year such as the standing commission model noted by Marc R. Rosenblum at MPI.

To finance additional research into the outcomes of auction systems implemented in Germany, Canada, et al which are comparable to specialty occupation visa workers and search for best practices.

Data/Clearinghouse

We recommend an inter-departmental data clearinghouse as a way to address the program’s issues with the application process, documentation, and susceptibility to fraud. The clearinghouse will restructure the current application system so as to unify and regulate the process, identify, collect, and aggregate relevant information in one place, and minimize potential for fraud both during the application process and the duration of an H-1B visa. Based on the abovementioned we recommend the following:

To create modest new reporting requirements that disincentivize fraudulent and/or dishonest practices. One of the possible types of reporting could be annual reports filed by employers that would include extensive data on their employees holding H-1B visas. Reports should be audited by government agencies (possibly by the proposed clearinghouse body).

To improve the capacity of agency officials to enforce labor standards. The main problem that exists in the immigration system is enforcement of laws, not the legislation itself. Hence, clearinghouse should be able to have control of enforcing labor standards based on better data received through the enhanced system.

To improve the capacity of stakeholders in government, businesses, labor organization, academia, and NGOs to analyze the program and its underlying effects and the program’s outcomes.

To create an information-sharing system to facilitate the easy and efficient collecting and sorting of data about specific H-1B workers over time.
Conclusion

Our literature review described the background of the H-1B program and key provisions in its organic statute, discussed the debates and controversies surrounding the prevailing wage and visa cap provisions of the H-1B program, and highlighted the importance of STEM industries and professions to debates about the H-1B program. Our broad review of the H-1B program and some of its more controversial characteristics such as the prevailing wage and visa cap helped inform our picture of the H-1B program as one about which surprisingly little is known with certainty.

Responsibility for administering the program is widely dispersed and there are few formal information-sharing efforts between agencies. There are no significant reporting requirements to track individual H-1B workers and the working conditions they face over time and no significant requirements that agencies monitor the activities of firms participating in the H-1B program. The program also largely allows the same number of workers to enter the U.S. each year regardless of how macroeconomic conditions or conditions in local labor markets may differ in any given year. This persistent uncertainty about the basic effects that the H-1B program has upon the domestic labor market has had a major impact on the policy debates about the H-1B program. So for instance, while there are fierce debates about the effect that H-1B workers have upon domestic workers’ wages and employment, data constraints have meant that few studies have been performed to actually estimate those effects. The studies that do exist are largely descriptive in nature and have little power to estimate how the H-1B program will affect labor markets in the future, which is at least as important as estimating the effects that the H-1B program has had on labor markets in the past. Similarly, any effort to estimate ‘demand’ for skilled foreign workers as a means of evaluating the H-1B program is severely limited by the design of the visa cap system and because demand is itself a function of the wage rate and demand changes whenever workers’ compensation changes.

This persistent uncertainty about the effects of the program heavily informed our choice of research questions. In particular, rather than undertake data-driven empirical research questions, severe data constraints compelled us to choose policy research questions in which we attempted to identify reforms that would make the program more transparent, that would reduce labor market inefficiency as a result of the program, and that would empower agencies with the authority to improve outcomes for both foreign and domestic workers. Our first research question looked at legislative remedies and in particular at the Durbin bills proposed in 2007 and 2009. After analyzing the reforms proposed in those bills, we identified four recommendations for legislative remedies (which dovetail with our other research questions). Briefly, these include:

- Grant the DOL additional investigative and enforcement powers.
- Create an information-sharing system between the DOL, DHS, and USCIS.
- Create additional incentive mechanisms for firms to engage in good faith hiring and employment practices including higher fines for labor violations and rewards for good faith records such as additional visas or first-preference during the application process.
- Reform the L-1 visa program concurrently with the H-1B program to eliminate loopholes for firms that avoid H-1B worker protections by utilizing the L-1 program. Or rather, reform the L-1 program so as to ensure that firms cannot easily substitute between the H-1B visa with its more restrictive reporting requirements and the L-1 visa with its more lax safeguards.

Our second research question focused on auction systems as one possible remedy to the problems posed by the current visa cap system. After analyzing several auction systems that have been attempted in other countries or proposed by stakeholder organizations in the U.S., we identified four recommendations. Briefly, they are to:

- Create a pilot program for the fiscal year 2012 in which employers participate in an auction to purchase a total of 5,000 visas after the normally binding cap of 65,000 visas has been reached. So in this system, the price of a visa is variable. The auction should take place after firms have completed the LCA stage and petition stage of their applications but prior to the final stage in which applicants would normally interview at the state department. Also, we recommend basing the number of auctions required to sell all 5,000 visas upon...
the time it takes to reach the regular visa cap. So for instance, if the cap is reached in April, we recommend holding an auction roughly every three months until all 5,000 are sold.

• Further research employee-based auction systems to determine whether they are viable models to test and measure labor market demand and inform future steps.

• Finance further analysis into studying the outcomes of each of the aforementioned pilot program and also explore other methods of rationing or apportioning visas each year such as the standing commission model noted by Marc R. Rosenblum from MPI. Compare and identify best practices.

• Finance additional research into the outcomes of auction systems implemented in Germany, Canada, et al and search for best practices that could be directly applied in the U.S.

For our third research question, we focused on reforms that would improve the quality of data gathered by agencies administering the H-1B program and would create a formal system in which agencies are required to share data. Briefly, our policy recommendations with respect to data gathering and analysis systems include:

• Create modest new annual reporting requirements that disincentive fraudulent and/or dishonest practices

• Improve the capacity of agency officials to enforce labor standards through creation of a more detailed record. This is made possible by better and more comprehensive data

• Improve the capacity of stakeholders in government, businesses, labor organization, academia, and NGOs to analyze the program and its underlying effects and the program’s outcomes.

• Create a clearinghouse system to facilitate the easy and efficient collecting and sorting of data about specific H-1B workers over time.

Having reviewed the available literature about the H-1B program, performed detailed research into three policy questions, and offered recommendations in each policy area based upon findings from our research, several notable trends have emerged regarding the H-1B program and efforts to reform it. These notable trends regarding the H-1B program and efforts to reform it are noted as follows:

For one, the fragmented and severely incomplete data about the population of H-1B workers creates significant difficulties in trying to rigorously estimate the effect that the program has upon the wages, employment, productivity, and working conditions of both foreign and domestic workers. There is no data collected about individual workers on an annual basis, no means of tracking individual workers and verifying the conditions of their employment consistently over time, and little data about the human capital characteristics of individual workers. The data that is publicly available regarding the H-1B program is largely data on petitions to the program rather than data about the characteristics of workers that are actually admitted to work in the U.S.. In the absence of more detailed and complete raw data, much remains unknown and hotly debated about the impact that the H-1B program has upon the skilled-labor market in the U.S.. The prior literature about the H-1B program has consistently acknowledged this problem. Likewise, our team’s capacity to perform an unbiased and rigorous quantitative analysis was severely limited by data constraints. As such, our research and policy recommendations have focused heavily upon reforms that would improve the availability and completeness of information about the H-1B population. If pursued, these reforms would greatly expand the capacity of stakeholders in government, business, labor organizations, and other concerned parties to objectively evaluate the effects of the program and offer more targeted policy remedies to any undesirable or unintended outcomes of the H-1B program.

Secondly, the authority to administer the H-1B program is heavily fragmented between the DOL, the DHS, and the DOS. In turn, this significantly limits the capacity of those agencies to detect, investigate, and deter fraudulent, dishonest, or abusive practices among participants of the H-1B program. The investigative and enforcement authority of the DOL is particularly weak. As a consequence, there are few institutional safeguards in place to verify that the wages reported by employers during the initial phase of their H-1B applications are actually paid to workers that enter the U.S. on H-1B visas. Likewise, there are few institutional safeguards in place to ensure that the visa applications which are ultimately processed by all three agencies comply with all of the technical regulations propagated.
by those agencies. Nor do agencies administering the H-1B program have sufficient investigative authority to ensure that any fraudulent reporting on the part of firms has been detected or sufficient enforcement authority to create clear channels for workers to report abuses without fear of reprisals by their employers or loss of their visa status. Moreover, in the absence of additional investigative and enforcement authority for the agencies administering the H-1B program, firms that have acted in good faith are largely indistinguishable from firms that have not and the market cannot select for good faith firms to dominate the program. As a result, our research and policy recommendations have focused heavily on legislative remedies that expand the authority of the DOL. If pursued, these reforms would offer workers additional safeguards to ensure that the incidence of fraud in the program is minimized, that workers can be empowered to protect themselves by reporting abuses without fear of reprisal, to verify that firms act in good faith, and that the program is utilized by employers to complement rather than replace their domestic workforces.

Thirdly, the current visa cap system is an inefficient way of allocating H-1B visas that is largely unrelated to the demand for foreign workers at any given wage or skill level. The visa cap system offers virtually no useful information to signal whether the demand for H-1B workers at any given wage or skill level is different from one year to the next. As currently designed, the visa cap system offers no flexibility to adjust the number of visas granted in any given year to reflect, for instance, a booming STEM labor market or a severe recession in which unemployment is high among skilled domestic workers. The current design of the visa cap system also makes it difficult to estimate whether, on balance, domestic employers are using the H-1B program to import skills that are not readily available in their local labor markets or whether those employers are using the H-1B program to import skilled labor to reduce costs compared to their more expensive domestic counterparts. As such, our research and policy recommendations have also focused heavily upon auction systems as one possible solution to the problems posed by the current visa cap system. However, after comparing three possible auction systems, we cannot say conclusively how each program would actually operate in practice, and the lack of data regarding the current H-1B population compounds the difficulty of estimating how each auction system would impact workers and firms. Moreover, the fairness and efficiency of any auction system would be directly related to the unique institutional features of a country’s labor and immigration laws and some auction systems which may suit some countries may nonetheless fail to improve outcomes for workers and firms if attempted in other countries. So while our research has found significant limitations regarding the current visa cap system, our policy recommendations largely focus on experimenting with various auction systems and making marginal changes without destroying the existing mechanisms for allocating visas. Given the uncertainty as to whether an auction system for allocating visas would improve outcomes for domestic and foreign workers, we do not recommend fundamental changes in the visa cap system at this time.
Endnotes

2 Ibid., section 1.
3 Ibid., section 205.
4 Ibid.
5 8 U.S.C., Chapter 12, Subchapter 1, § 1101 (a) (H) (i) (b).
7 Ibid., section 205.
9 Ibid.,section 205.
12 Ibid.
14 Ibid.
15 Ibid.
16 Ibid.
26 Ibid.
28 Ibid.
29 Ibid.
30 Ibid.
32 Ibid.
34 Patrick Thibodeau & Stewart Deck, “GOP Eyes Boost in Foreign Workers: Congressional Leaders Want H-1B Vias Cap Raised to 200K to Ease IT Labor Shortage,” COMPUTERWORLD, 10, August 9, 1999.
36 Ibid.
39 U.S.C. § 1182(n) (1); 20 C.F.R § 655.730-34 (1998);


Ibid.

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Ibid.
45
H-1B Program

67 Ibid.


70 Ibid.

71 Ibid.


74 Ibid., 2

75 Ibid.

76 Ibid.


78 Ibid.


82 Ibid., Table 8B and Table 9A.


84 Ibid.

85 Alex Nowrasteh, "H-1B Visas: A Case for Open Immigration of Highly Skilled Foreign Workers," Competitive Enterprise Institute, October 2010, 2010 No. 3, 2.

86 Ibid.


92 Ibid., Table 6.


104 Ibid.

105 Ibid.


110 Ibid.


We have formulated two employee-based models based on conversations with the AFL-CIO as well as allusions in forums and literature.


Ibid., 82-83.

Ibid., 79.

Ibid.

Ibid., 85.

Ibid.,81,e.g. H-1B1, H-1C, L-1, TN, O1, E1, and/or E2 visas).

Ibid.,74, Orrenius and Zavodny suggest the federal government preserve this exception by either providing a rebate to employers for all or part of the cost of permits for non-profit and public institution H-1B visa workers or allocating a set number of visas for those organizations independent of the auction system.


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152 See endnote 139/cxxxxix.


156 Ibid.


H-2A
Executive Summary

Our investigation of the H-2A visa program highlights the strengths and weaknesses of the H-2A visa. It is structured to offer recommendations to both strengthen the program and incentivize its usage. Research began with the objective of finding ways to improve the H-2A visa program, which our analysis will show needs to begin with actual enforcement of existing H-2A visa law, and immigration reform. The following research questions served as the framework for our investigation:

- What are the shortcomings of the current H-2A program?
- How are these shortcomings being addressed?
- Does the FLOC-North Carolina Growers Association Agreement serve as a model for the H-2A program nationwide?

In addressing the questions above, our team analyzed the history, workplace conditions, recruitment concerns, potential for collective action, and labor market constraints associated with the H-2A visa program.

Our analysis reveals an underutilized program that offers workers the greatest protection of any H-visa class, yet ultimately fails to meet its intended goals. Enforcement of rules and regulations is porous at best, and the hiring of undocumented workers mitigates any inroads the guarantees of the H-2A program. Those considerations contribute to the greatest quantifiable shortcomings of the visa, including workplace and living conditions that overwhelmingly do not abide by federal and state regulations, limited to non-existent collective bargaining opportunities for workers, and circumstances that make FLOC so unique that it cannot serve as a nationwide model. Even with weak enforcement, hiring undocumented workers proves far simpler for employers. For those employers who do hire H-2A workers, lack of federal and state enforcement of regulations leaves a great deal to be desired. This yielded critical concerns regarding the deplorable workplace and housing conditions that violate existing law, but that H-2A workers must contend with.

Thus, significant room for improvement within the program exists. The following serve as our recommendations to strengthen the H-2A visa program:

- Comprehensive, state-by-state analysis of the FLOC-NCGA Agreement.
- Regulation of Intermediaries.
- Elimination of the system that binds workers to employers.
- Creation of a Bi-Partisan Research Organization.

Inherent in these recommendations is the one consideration that is paramount to any H-2A visa program amendment: comprehensive immigration reform. Our analysis revealed intermediaries who operate yet are unregulated, allowing for illegal hiring practices and the prevalence of unacceptable working and living conditions of H-2A workers. The prevalence of these hiring practices and conditions is a direct result of breakdowns in regulation and current law, exacerbated by a majority of employers who shy away from the H-2A program because hiring undocumented workers is easier and cheaper. Therefore, any recommendation authored within this analysis lacks effectiveness in the absence of a complete overhaul of our national immigration system.

Despite the concerns listed above, and the information gap in H-2A research, the recommendations provided in this paper are supported by existing data and capable of implementation. A comprehensive, state-by-state analysis of the FLOC-NCGA Agreement can allow for analysis of the mechanisms that would be necessary to create a program similar to FLOC in other states. Regulation of intermediaries can help to ensure hiring practices are fair and workers receive the full rights they are guaranteed. A system that does not bind employees to employers will allow for greater flexibility in economic mobility of workers while easing cultural adjustment issues they may have. Finally, the creation of a bi-partisan research organization to address the H-2A visa program’s shortcomings and potential solutions could hopefully close the information gap that continues to stall H-2A visa program improvement.
Literature Review

Introduction

H-2A visas are issued to non-immigrant workers for temporary or seasonal employment in the American agriculture industry. Often times, H-2A visas are issued due to concerns over providing an adequate labor supply, because there is a lack of domestic workers seeking seasonal employment in the agriculture industry. This investigation highlights the strengths and weaknesses of the H-2A visa, and is conducted with the goal of issuing recommendations that improve the H-2A visa program and incentivize its usage. The following research questions will serve as the framework for our investigation:

- What are the current shortcomings of the current H-2A program?
- How are these shortcomings currently being addressed?
- Does the FLOC-North Carolina Growers’ Association Agreement serve as a model for the H-2A program nationwide?

This literature review highlights issues within the first two research questions and provides a preliminary investigation of the H-2A visa program. Subsequent to the literature review, our analysis continues to address our research questions and is expanded to include a case study of the tobacco industry in North Carolina and its connection to the H-2A visa program, which answers the third research question. The final product ties together our current preliminary findings with additional data that serves to (a) address our research questions; and (b) provide the basis for policy recommendations to the AFL-CIO with respect to improving the H-2A visa program.

The first section of this literature review addresses the history and structure of the H-2A visa program, and transitions to its administration. In assessing the visa’s administration, issues with recruitment, oversight, the prevailing wage, and incentives to issue the visa are addressed. From a worker standpoint, discrimination and the lack of unions are assessed, along with workplace conditions and visa intermediaries.

History

From its origins in the Bracero program to recent changes by the Obama administration, the H-2A temporary agricultural worker visa has experienced a controversial history, demonstrating significant potential for improvement. The Bracero program, which lasted from 1942 to 1964, aimed to fill the agricultural labor shortages that resulted from WWII. The post-war Bracero program highlighted a need for a formalized codification of short-term labor visas. Thus, in 1952 the Immigration and Nationality Act (INA) formally created a visa that allowed for non-immigrant short-term labor, the H-2 Program. While depressed wages and unfavorable living conditions resulted in the dissolution of the Bracero program, the H-2 visa continues to allow term labor into the United States.

The design for the H-2 program allows employers to hire both non-agricultural and agricultural workers by demonstrating domestic labor shortages. The 1986 Immigration Reform and Control Act (IRCA) modified the H-2 program by dividing it into its two categories, temporary agricultural (H-2A) and temporary non-agricultural (H-2B), allowing for greater oversight and measures that meet the needs of each occupation type. After more than 20 years of relatively little change, the Bush Administration revised the H-2A visa in December 2008 to decrease government oversight, lower wages, and reduce requirements for growers to capitalize on the domestic labor supply before looking outside the US. After a little over half a year, the Obama administration suspended these revisions and returned the H-2A program to its pre-2008 structure. The result is a program that currently focuses more on employee rights, but as this investigation indicates, has significant room for improvement. As this historical analysis illustrates, the H-2A visa program has been implemented in large part to meet the demands of the American agricultural industry. The following overview outlines how this demand is met through the H-2A visa recruitment process.

Recruitment

The recruitment process for H-2A visa holders is unique among the H-visas. As stated earlier, employers petition for visa workers based on domestic labor shortages and no cap is placed on the number of H-2A visas awarded each year (as illustrated by the chart below).

While the process aims to supply much needed seasonal agricultural labor, several problems
exist, including discrimination, communication breakdowns, and intermediary involvement.

Discrimination is evident in the H-2A recruitment process. Workers seeking the H-2A visa are not always afforded the same opportunities for employment in the United States. Andrea Schmitt details one way discrimination exists. She explains that farm workers from Thailand are increasingly interested in seeking temporary agricultural employment in the United States. Due to large domestic fees paid to labor recruiters and greater cultural or linguistic isolation, however, fewer Thai men and women apply for and receive H-2A visas. Elswick argues further that individual companies can participate in employment discrimination. Employers recruiting outside the United States are not subject to domestic discrimination statutes. As a result, companies can specifically seek, for example, young single Mexican men exclusively.

Communication is another major problem associated with H-2A recruiting. In Congressional testimony recorded on February 10, 2011, Tom Nassif, the CEO of the Western Growers Association explained that at the Department of Labor’s Chicago Processing Center, it is “impossible to contact a live person...to inquire about a pending H-2A application”. Nassif also claims that despite early application requirements (60 days before date of need), the department is typically slow to respond and frequently delays certification. The communication problem, however, is not simply agent-to-worker. Alison Guernsey explains that the two-step approval process between the Department of Labor and the Employment and Training Administration is grossly inefficient. Add regulatory requirements set by the Department of Homeland Security, as well as Citizenship and Immigration Services and 50 different State Workforce Agencies, and the system is perpetually log-jammed. As Tom Nassif would argue, a lengthy application process, especially for temporary work determined by anticipated shortages makes little sense. If it is simply the result of agency involvement, streamlining the program may be a viable solution.

Another problem is the existence of intermediaries, or colloquially, job shops. Job shops are alleged to extort immigrant workers, charging exorbitant fees or percentages of wages in exchange for job placement services. Despite this limitation, improvements in recruiting temporary workers could dissolve the effectiveness of intermediaries and help protect immigrant worker rights and earnings.
Research does suggest that these problems are not terminal. Elswick cites the development of the Farm Labor Organizing Committee (FLOC) and the increased involvement of the United Farmworkers of America (UFWA) as factors that could mitigate recruitment violations. He explains that union or even quasi-union involvement in temporary farm work could move legislation focused on the human rights of the workers, specifically, social services and health. Jennifer Hill also looks to FLOC as a source of hope, but takes her argument one step further. Hill claims that FLOC currently presents the best opportunity to create Bi-national Unions, which she calls the “new hope for guest workers.” A Bi-national Union, allowing for worker membership to span borders, would ideally allow workers more equal opportunity to temporary jobs, more clarity on application status, and better protection from adverse working conditions, several of which are outlined later.

Collective Action

A common argument against the necessity for migrant worker collective action is the “employment-at-will” policy within U.S. labor law. Employment-at-will means that, barring any pre-employment contracts, such as non-compete clauses, employees have the ability to “bargain with their feet” by seeking employment elsewhere if they feel they are being mistreated, undervalued, or underpaid by their current employer. Although this theory fails to account for the irrefutable imbalance in power that exists between management parties and a single employee, on some levels it can be said that it holds true in some industries.

Conversely, the H-2A visa program is designed so that an employee is tied to the employer who initially extended the employment offer and sponsored their visa. As such, the ability of an H-2A visa holder to enter and remain in the United States is entirely contingent upon their employer. This inherently flawed system allows for the sanctioned exploitation of H-2A visa holders by creating an incredibly vulnerable population that “lack[s] the bargaining power of other workers.” If a worker feels as though their conditions are intolerable, deportation is their only other option.

Following the logic that employment-at-will makes unionization superfluous, the single-employer format of the H-2A visa program could lead one to conclude that this group of employees is most vulnerable to employer maltreatment and abuse and as such is drastically in need of the protections afforded by the power of collective action. Unfortunately, all agricultural workers are explicitly excluded from the National Labor Relations Act, which was designed to protect employees from being discriminated against by employers for attempting to form a union or participating in any behavior that is classified as protected concerted activity. As such, there is nothing barring an employer from terminating an employee if they are caught or even simply suspected of attempting to engage in collective action. A 2000 Study published by the Human Rights Watch states that, “if they [H-2A visa holders] try to form or join a union, the grower for whom they work can cancel their work contract, putting them in ‘out of status’ and liable for deportation”. With no legal remedies or protections to turn to, anecdotal evidence has shown that visa holders are frequently too scared to complain about their working or living conditions. As such, H-2A visa holders are forced to endure the frequently abysmal working conditions implemented by their employers. It is this flawed design of the H-2A guest worker program that deters collective action and, with no legal remedies or protections to seek redress, H-2A visa holders are forced to “accept onerous and illegal conditions that would be rejected by workers who have a union contract or the freedom to quit and find another job”.

Workplace Conditions

As H-2A visa holders are employed in the agricultural industry, it is important to note the unique environment in which these visa holders work. Normally, there are a variety of migration arrangements for seasonal workers, often referred to as “follow the crop” and “point-to-point” migrancy patterns. The former involves workers who harvest crops as they ripen, and move northward as the crop season progresses, often times beginning their employment migration in the south. The latter is generally associated with H-2A visa holders. The housing accommodations for point-to-point workers can unfortunately include barracks-style quarters and even mobile homes, which although free, are not ideal living conditions. In the workplace itself, the varying weather patterns expose migrant farm workers to conditions that are unique to their specific job field and combine with others factors to make for a rigorous job experience. In short, farm work is both physically and psychologically demanding, exposing workers to
varying weather extremes and other environmental issues.

Combined with the physical rigors associated with farm labor, such as bending to pick strawberries or working off of ladders, a multitude of environmental factors contribute to a truly risky work environment. Some of the most important are issues involving exhaustion and pesticide exposure. Exposure to pesticides can lead to a variety of health problems, including headaches, vomiting, inability to concentrate, and difficulty breathing. The long-term effects of such exposure are problematic; however the temporary nature of H-2A visas ensures that workers will bear the brunt of this burden. (There is also a concern regarding chemicals used in tobacco crops, which will be highlighted in our investigation’s case study of North Carolina). Additionally, in the event health problems associated with the work environment detract from the ability of visa holders to perform the duties associated with agricultural work, additional stress can be created for workers. Although difficult to avoid, workplace stress for H-2A visa holders can result in both mental health and physical health ramifications, all of which combine with the nature of agricultural work to be incredibly risky for temporary agricultural employment.

It should be noted such hardship is not restricted to the physicality of farm work. There are also psychosocial factors as well, such as stress due to long workdays, a language barrier, separation from families and a familiar culture, and labor that takes place in all kinds of weather and the temporary nature of employment associated with the H-2A visa. This makes the work of H-2A visa holders unique in comparison to that of H-1B and H-2B workers, necessitating a commitment to a safe work environment and adequate housing and health accommodations. Unfortunately, such a commitment must be brought into question when research concerning regulations for H-2A farm worker housing yielded little positive information other than the fact that it is free. Additionally, migrant farm workers are often relocated and forced to adjust to new work environments, which brings additional stress due to new surroundings. This exacerbates the time workers are away from their families and homes, and living in crowded and isolated locations with limited access to transportation and potentially discriminatory communities.

In terms of improvements to the H-2A visa program, several obstacles exist. As the majority of H-2A visa workers are from Mexico, a severe language barrier exists for H-2A workers, who in some instances may not be able to adequately articulate their concerns. Second, there are currently three entities that are involved at different points of H-2A visa acquisition. Currently, the Department of Labor records the number of workers requested by employers, and the number of employees certified by the department. The Department of Homeland Security then collects the number of H-2A visa entrances. With three different federal agencies overseeing the various phases of the application process, research has not yielded where ultimate accountability lies from a federal standpoint with respect to improving the H-2A visa program.

This implies that the burden of improving the program falls on the employer. Under current federal regulations, however, the employers have no incentive to reform. It should be noted that agricultural employers who do not use H-2A workers could rely on intermediaries or undocumented labor to meet their labor quotas whereby employers would not be bound by H-2A visa regulations. This makes the absence of guaranteed rights of H-2A visa holders “superior” to other workers in the same industry, de-incentivizing both employer participation in the H-2A program and an improvement in conditions for H-2A workers. Thus, while H-2A workers are guaranteed free housing and workplace conditions in accordance with Department of Labor standards, their inability to unionize and, in some ways, superior working conditions pose significant barriers to improving working conditions.

In summation, the effect of workplace conditions on H-2A visa holders is not entirely physical in nature. Psychosocial factors play a prominent role in creating a difficult work environment, particularly for those who do not speak English. Combined with extended separation from families and nations of origin, H-2A visa holders are exposed to varying degrees of stress that other professions simply do not contend with. From a physical standpoint, health concerns associated with the varying weather extremes, chemical exposure from crops, and physical exertion place demands that migrant farm workers must endure and pose both short and long-term health effects. As previously stated, the inability for collective action on the part of H-2A workers exacerbates these considerations, making policy recommendations for work environment improvements difficult.
Nevertheless, the preliminary recommendations associated with improving the H-2A visa program, from a workplace conditions standpoint, include 1) investigating the potential for workers to unionize; 2) providing ESL instruction, or an interpreter, to convey worker issues; and 3) consolidating the number of federal agencies that contribute to the application and disbursement process of the H-2A visas. (This will be further researched through our ongoing investigation and case study of North Carolina). While this section was responsible for assessing workplace conditions for H-2A visa workers, the next will assess subsequent labor market conditions and wage floors for the workers.

**Labor Market Conditions, Wage Floors, and Policy Considerations**

Labor market tests for the H-2 programs are designed to survey the current conditions in order to determine if guest workers are needed. The programs accomplish this task in different ways. The H-2A program utilizes labor certification whereas the H-2B program utilizes labor attestation. The Department of Labor issues a determination regarding U.S. worker availability and potential adverse effects on U.S. workers. The recruitment process for U.S. workers begins when an employer submits a job order to the appropriate state workforce agency (SWA). The labor attestation is completed by an employer who attests to specified labor conditions. Two primary considerations for the H-2A visa are perceived labor shortages and the appropriate wage floor. Although the wages in agricultural industries are low by U.S. standards, they are high by international standards. Under The Immigration and Nationality Act of 1952, prospective employers must certify to the Department of Labor that there are no U.S. workers who are able, willing, qualified, and available to perform the jobs and that the employment of the guest worker will not have an adverse effect on either the wages or the working conditions of comparable domestic workers. In response to the mandate, the Secretary of Labor developed a three-tier system. Employers were required to pay the highest of the adverse effect wage rate (AEWR), the prevailing hourly wage rate, or the legal federal or state minimum wage rate.

"On September 4, 2009, the Department [of Labor] published in the Federal Register a Notice of Proposed Rulemaking proposing to amend the 2008 regulations governing the labor certification process under the H-2A temporary agricultural worker program." On February 12, 2010, the Department of Labor issued new regulations in the form of the 2010 Final Rule which [took] effect on March 15, 2010. According to the Employment and Training Administration, starting March 15, 2010 the new H-2A Regulations at 20 Code of Federal Regulations (CFR) 655.120(b), now require that if the prevailing hourly wage or piece rate is adjusted during a work contract and is higher than the highest of the Adverse Effect Wage Rate (AEWR), the prevailing wage, the agreed-upon collective bargaining wage, or the Federal or State minimum wage, in effect at the time the work is performed, the employer must pay that higher prevailing wage or piece rate upon notification by the Department. To determine if a prevailing hourly wage or piece rate has been adjusted for the crop activity or occupation identified in the employer’s Application for Temporary Employment Certification, the employer must periodically visit the Department of Labor’s Agricultural On-Line Wage Library (AOWL).

The AEWR pertains to agricultural guest workers involved in temporary or seasonal work. This wage rate assumes that attempts to locate domestic workers have been unsuccessful. The AEWR is based on a quarterly survey of wages of field and livestock workers conducted by the Department of Agriculture. It is a weighted average, calculated regionally using information contained in the surveys and information about prior changes in the wage. Alaska is the only state that does not have an AEWR. These regulations do not apply to workers paid on a piece rate basis such as by load, bin, pallet, bag, or bushel. Unlike other H-visas, the prevailing wage for the H-2A Program is determined by the state workforce agency and may be modified. According to the 2010 Final Rule, prevailing wage rates are regionally determined through the SWA when job orders, Agricultural and Food Processing Clearance Order, are submitted.

There are a number of issues raised by the H-2A program. The presence of guest workers increases competition by artificially expanding the labor supply, influences the behavior of employers by providing a range of disincentives, and impacts domestic agricultural workers by supporting restrictions on...
working conditions and wages. Some contend that the AEWR places a cap on the wages for workers in certain industries because the regulations allow employers to post jobs at the AEWR rate and pay this wage to guest workers if domestic workers are not available. Overall, these conditions create disincentives for employers to improve working conditions or wages, engage in collectively bargaining, and modify recruiting and employment policies.26

There are long-standing claims by employers that the regulations associated with the H-2A program are cumbersome and by farm labor advocates that the protections are insufficient. According to Wasem and Collver, there are five main issues characterizing the legislative debate about guest workers. The first issue is related to labor supply. Employers assert that labor shortages require the recruitment of guest workers, whereas farm labor advocates assert that a labor surplus exists. The second issue is related to the responsiveness of the program to workforce needs. Employers would prefer to reduce the processing time and government interference, whereas others believe these changes would be detrimental, i.e. moving from a certification to an attestation would create insufficient labor market tests. The third issue is related to allowing legal permanent residence status for guest workers, documented or undocumented. Some contend this disproves the “temporary” nature of the visas, whereas others contend this would encourage migration. The fourth issue is related to the adverse effect of guest workers on domestic workers. On one hand, the presence of guest workers has a negative impact on the employment, wages, and working conditions of domestic workers. On the other hand, guest workers and the associated domestic workers have better protections than domestic workers in other industries. For example, the AEWR for the H2-A program ensures higher wages for these employees. The final issue is related to benefits for guest workers. Some argue that agricultural workers, guest and domestic, should receive better wages, better benefits such as healthcare, and the right to collective bargaining.29

Beyond issues such as adverse effects and residence status, conflicts involve the larger questions about retaining, modifying, streamlining, or eliminating the H-2A program. For example, one proposal is the creation of a farm worker registry maintained by the U.S. Employment Service. Ideally, the registry would ensure that attempts to locate U.S. workers are more exhaustive and that guest workers are authorized for employment. However, there are practical considerations such as the transitory nature of the population and provisions for providing up-to-date information and funding.30

According to a 2006 Congressional Research Services Report, additional policy issues range from program caps to enforcement to homeland security. Potential legislative changes to the H-2A program place limits on the number of visas issued based on regional unemployment rates, design mechanisms for ensuring employer compliance with regulations and worker compliance with leaving the United States when the visas expire, and program participant screening.31

Proposals for legislative changes have been largely unsuccessful. An attempt in the 104th Congress to replace the labor certification process with a labor condition attestation and to supplement the program with a pilot temporary agricultural worker program failed. An attempt in the 105th Congress to modify the program by creating a registry of available domestic and guest workers in the Department of Labor and a path to legal permanent residence for H-2A also failed. The registry allowed employers to petition for H-2A workers if domestic workers were not available. In the 106th Congress, a provision in the Immigration and Nationality Act amended the time frame for domestic recruitment, reducing the filing and processing of H-2A labor certifications to 15 days. An attempt to create an amnesty program for unauthorized guest workers and agricultural worker registries failed.32 A notable portion of proposed legislation is the “Agricultural Job Opportunity, Benefits, and Security Act of 2003.” The bill was designed to overhaul the program and included a labor attestation system, a legalization program for agricultural workers, housing allowances, and minimum benefit, wage, and working condition requirements. Different versions of this bill have been introduced in successive sessions.33

**Next Steps**

This literature review is intended to provide a brief overview of the H-2A visa program and some of its current shortcomings. Moving forward, our analysis will attempt to highlight these issues through a case study of the tobacco industry in North Carolina, which will address our third research question (should the national H-2A visa program be modeled after North Carolina?). Analysis will also continue for the considerations addressed in this literature review, with a specific emphasis on labor market...
North Carolina Case Study

Recruitment

Several relevant factors, particularly geography, demographics, and the existence of FLOC, impact H-2A recruitment efforts in North Carolina. First, North Carolina sits below the Mason Dixon line in the Southeastern United States. According to the State Climate Office of North Carolina, the normal mean temperatures range from lows in the mid-twenties (Fahrenheit) to highs near eighty-five degrees. The annual mean temperature throughout much of the state is between fifty-five and sixty-five degrees. The extended warm season from April through October is conducive to a large agricultural industry. Consistent precipitation falls throughout the year with summer months usually receiving the most rainfall. The mix of warm weather and precipitation allows for productive growing seasons and make North Carolina a reasonable destination for many H-2A visa workers.

The state, however, is not accessible for all workers. Even with reimbursement, travel distance from countries such as Laos, Thailand can inhibit visa workers from accepting employment. The population of H-2A recipients illustrates this fact. Mexican and Latin American workers can travel much more easily to North Carolina for seasonal work.

Demographics also impact H-2A recruitment in North Carolina. In “New Destinations: Mexican Immigration in the United States,” De Genova details why and how North Carolina became a destination for Mexican immigrants. He explains that as tourism and healthcare industries expanded, especially in the coastal counties, low income and poorly qualified workers abandoned wage work and subsistence hunting. This created a market for immigrant labor throughout the state. As a corollary, the North Carolina economy went nearly a decade following the rise of Mexican immigration without experiencing prolonged periods of contraction. Workers in tourism and healthcare maintained their jobs, allowing a number of immigrants to lay roots in North Carolina. De Genova explains that the growing immigrant population and strengthening networks will continue H-2 visa growth in the state. Since 2007, unfortunately, the United States’ economy has wavered. The current recession has affected North Carolina both in terms of budget deficits and unemployment. But with the need for seasonal agricultural labor still present and networks in place, North Carolina’s H-2A recruitment is likely...
to continue and likely to rely heavily on Mexican immigrant labor.

A final factor influencing H-2A recruitment in North Carolina is the existence of FLOC. While this section of the case study will not detail FLOC, it will highlight its importance. FLOC makes the North Carolina case unique in many ways. Sandy Smith-Nonini argues that FLOC brought oversight to the North Carolina Growers Association (NCGA) from recruitment to working conditions and prevailing wage.\(^{43}\) She explained that as the NCGA found success, state and public scrutiny declined and the exploitation of laborers grew more prevalent. FLOC’s intervention on behalf of the workers “improved wages for the H-2A workers hired by NCGA members, and created a transparent and orderly system for resolution of grievances and for determining the crucial question of which workers would get brought back, and in which order, for future seasons.”\(^{44}\) FLOC became, in essence, what Smith-Nonini calls a Transitional Labor Union by helping to streamline recruitment efforts. The overall impact of FLOC on recruitment in North Carolina is clear; an outside organizational body representing the interest of the laborers streamlines recruiting through dispute resolution. While geography, demographics, and FLOC make North Carolina a unique case, some specific qualities of H-2A recruitment in North Carolina can provide a useful model for a number of other states.

**Workplace Conditions**

The North Carolina Security Commission estimates that “approximately 8,000 to 9,000 of approximately 40,000 migrant farm workers are in the state on an H-2A visa.”\(^{45}\) In the tobacco industry specifically, physical exertion often does not involve machinery but the maintaining of physical postures low to the ground, negatively impacting worker health.\(^{46}\) Despite the physical demands of farm work, psychosocial factors found in a North Carolina case study of stress for H-2A workers cited a higher level stress resulting from less work or gaps in work than from the actual physical demands of labor.\(^{47}\) A separate study found stress associated with maintaining a clean home environment in substandard living areas, the conditions of which will be explored shortly.\(^{48}\)

The chief workplace condition concern for H-2A visa holders is pesticide exposure. Prolonged exposure to pesticides, even in small amounts, increases the risks of infertility, birth defects, neurological damage, and cancer.\(^{49}\) As H-2A workers come into contact with crops on which growers use chemicals and other pesticides, they place themselves in danger of health concerns. An additional concern in the workplace relates to the housing conditions of workers, as many workers bring the pesticides they are exposed to home, an even likelier scenario as often times farm workers live adjacent to the fields they work in.\(^{50}\)

With respect to housing, existing studies of farm worker domiciles indicate they are often overcrowded, infested with insects, contain residential pesticides, lack basic appliances, and are located near fields.\(^{51}\) A North Carolina study on housing accommodations for agricultural farm workers found that the majority of households were crowded, which is defined as having more than one person per room.\(^{52}\) Additional overcrowding was found in bedrooms, with 43.6 percent of respondents sharing a bedroom and more than half sharing one bathroom among three people and several households sharing one bathroom among six people.\(^{53}\) The study surprisingly indicated that the number of grower-provided housing units has declined in recent years, which correlates to a decline in quality of housing. This is noteworthy in that grower-provided housing must comply with federal housing regulations, including annual inspections.\(^{54}\) Unfortunately, the study further asserts that in the event grower-provided housing is likely to be substandard, health risks increase for workers.

These risks include pesticide exposure and spread of disease due to crowding or improper hygiene practices, and pesticide removal concerns as a result of inadequate bathroom and laundry facilities.\(^{55}\) Essentially, farm workers risk becoming a part of a vicious cycle whereby they are exposed to pesticides in the workplace, take it home, and expose their roommates to any health conditions that result from pesticide exposure.\(^{56}\) This also becomes exacerbated in the event there are residential pesticides in worker homes, often times the result of pesticides that drifted from the workplace to residential housing units.\(^{57}\)

Clearly, available research indicates that North Carolina H-2A visa holders lack adequate housing. Many North Carolina farm workers live in substandard housing, which increases the risk for health problems and exposure to pesticides from the work place. While psychosocial stress is a consideration of health issues that H-2A workers must contend with, it is often less involved with the actual physical demands of work and instead more greatly correlated with cultural
adjustments for workers and any period in which they do not have work or tasks to perform. Thus, moving forward, significant attention needs to be paid to improving the housing conditions of H-2A workers, as there appears to be a gap in what federal regulations call for and the actual provisions from growers. Finally, pesticide exposure needs to be monitored, with health regulation adherence to lower the risk of pesticide exposure. This also correlates to adequate housing, particularly bathroom and laundry facilities, that would allow farm workers ample opportunity to clean themselves after pesticide exposure. While these considerations affect workers from a physical standpoint, the following section will highlight the economic effect on the H-2A Visa program through an analysis of labor market conditions.

**Labor Market Conditions**

There are regional differences in the distribution of H-2A workers across the United States. Furthermore, the distribution of these workers within a given state is not uniform. H-2A workers comprise less than 2% of the farm worker population nationally. The largest concentration of H-2A workers is located in the southeastern portion of the country. The main crops these workers tend to include tobacco, apples, sweet potatoes, nursery stock, and tomato. For purposes of this analysis, the tobacco industry’s connection to H-2A workers in North Carolina will be analyzed.

North Carolina’s primary crops include tobacco, cucumber, sweet potato, and strawberry, with the state certifying the most H-2A workers. North Carolina also accounts for approximately 10% of H-2A workers and 50% of the tobacco production. Approximately 23% of tobacco growers in the state utilize the program. There are four types of tobacco crops including flue-cured, dark-fired, dark-air, and burley. Over 50% of the flue-cured and dark-fired growers have H-2A workers, whereas fewer than 20% of dark-air and burley producers utilize H-2A workers. Two factors that determine the number of workers in the southeast are whether the crop is labor or capital intensive and the scale of the grower’s operation as measured by acreage, size of the farm, and cash receipts. Overall, “the most likely users of H-2A labor are full-time growers, operating large farms, earning total farm cash receipts of $250,000 with more than 50 percent of cash farm receipts from tobacco.”

A survey of the studies on the impact of migrant workers on agricultural and non-agricultural labor markets utilizing H-2A workers is characterized by a lack of consensus. Various stakeholders such as farm advocates, labor economists, grower advocates, and immigration specialists disagree about the presence of a labor shortage, adequate protections for domestic workers, the wage rates, the calculation of the rates, the impact of both documented and undocumented workers, and the costs associated with labor certification. Empirical studies on the labor market impact are limited and contradictory. Empirical studies on the impact in individual states are also absent, serving as a significant limitation to our analysis. An extensive evaluation of existing studies, data integrity issues, and deficiencies in objective measures is contained in a separate analysis section. Unfortunately, there are no available studies for North Carolina. Accordingly, a comprehensive labor market analysis for the case study is not possible for this project. However, a study of the impact of agricultural workers in Virginia was conducted in 1998. This study is relevant to the North Carolina case because of the similarities in agricultural crops and the prominence of H-2A workers in the tobacco industry.

The Virginia study takes the usual step of recognizing and quantifying the contributions of migrant, seasonal, and H-2A workers (MSFW’s). Seasonal workers maintain a permanent residence that is easily accessible. Migrant workers, on the other hand, travel to the workplace and cannot return home at the end of the workday. Although the data is over a decade old and the H-2A workers play a minimal role, the study provides guidance for market analysis for future regional studies. The study examines the costs associated with employing this group of workers, their economic value added, and the potential impact on the agricultural and non-agricultural sectors of the economy in their absence.

Tobacco growers in Virginia are located in the Southside and Southwest portion of the state. Vegetable growers, the largest group of employers, are located on the Eastern Shore. The largest percent of H-2A workers, approximately 50% of the MSFW’s, are located in the Southside region. The major costs associated with MSFW’s are housing and transportation. The costs of housing are determined by type and contractual arrangement. Workers may be housed in trailers or single-family homes on a grower’s property, or a grower may contract with a labor camp owner such as a growers association. The
costs of transportation include the initial cost from the country of origin to the worksite, and the cost to and from labor camps. The economic contribution of MSFW’s is associated with income from wages.59

Aside from weather conditions that determine the quality and production of crops, the wages of workers are composed of several factors. “Earnings vary according to crop, time of year, method of payment, geographic location, employer, and the ability of the worker.”60 For example, the form of payment includes per unit harvested, a piece rate for harvesting, or an hourly wage for non-harvesting tasks such as pruning. According to the study, seasonal workers spent the larger portion of their income in the local economy and H-2A workers the least. The level of spending by a MSFW is determined by factors such as transportation and housing costs, proximity to businesses, family composition, and access to substitute goods. Seasonal workers are generally locally established, homeowners who have families. Conversely, migrant workers are mobile, having access to transportation and recreational activities. H-2A workers have reduced mobility as a result of language barriers and dependence on crew leaders for transportation. For workers who live in or close to large labor camps, social events and vendors provide additional opportunities to spend their income.61

An additional consideration is related to a counterfactual inquiry – what is the impact if MSFW’s are absent? Both producers and university faculty members contended that all relevant fruit, vegetable, and tobacco farms would vanish. The study identifies three potential effects including direct, indirect, and inducted. Direct effects can be seen through housing and transportation costs. Growers spend money to build and maintain housing and spend money on gas, insurance, and maintenance for vehicles. Indirect effects can be seen through the impact on non-agricultural industries such as through fertilizer sales. Finally, induced effects can be seen through disposable income changes, such as spending associated with food purchases by farm workers.62

Although the Virginia case study is not current, the issues it raises are. Current debates about the agricultural sector include the behavior of growers. Proponents and opponents make disparate assertions about potential macro-level and micro-level changes. A reduction in the labor supply will force growers to address wages and working conditions. Higher wages and improved working conditions, some argue, will attract domestic workers. In addition, the reduction will produce changes in the type of crops and number of producers. Growers, some argue, will modify farming methods, switch from labor to capital intensive crops, or exit the agricultural industry entirely. Finally, current debates revolve around regional issues. A prominent debate is the nature of the relationship between agricultural and non-agricultural sectors. Agricultural sectors are concentrated in certain geographic areas across the country and within states. Growers and their advocates object to the calculation of the adverse effect wage rates in individual states. According to these stakeholders, the wage rate is too high and the federal methodology accounts for wages of irrelevant, non-agricultural industries. Clearly, labor market conditions play a prominent role in the debate surrounding H-2A visa holders. The following section addresses the potential for collective bargaining rights of H-2A workers.

Collective Bargaining

In the mid 1960’s a small group of migrant agricultural workers from northwest Ohio banded together to form the Farm Laborer’s Organization Committee. Nearly fifty years later, their membership has grown to the tens of thousands as migrant workers are drawn toward FLOC’s mission of giving a voice and collective power to marginalized agricultural laborers. Unfortunately, while migrant workers thrived under FLOC’s protection in the Midwest, it was painfully obvious that in other states beyond FLOC’s reach, particularly North Carolina, migrant workers continued to suffer. Statistics showed that the number of farm workers living in poverty increased from fifty per cent in 1990 to sixty-one percent of farm workers living in poverty in 1995.63 Medical studies reported that instances of internal parasites among farm workers such as hookworm were substantially higher (in some cases 20 times more prevalent) than had been reported in previous years.64

It was in response to harrowing reports of H-2A worker hardships that it was made painfully obvious to FLOC leadership that the federal government was failing those migrant workers who were beyond FLOC’s current reach. This realization moved FLOC to begin campaigning for workers rights in North Carolina in 1993.65 Specifically, FLOC set its sights on the pickle growing industry where complaints such as non-potable drinking water, improper sanitation in the working fields, inadequate, dilapidated housing
and denial of other basic rights to which H-2A visa holders are entitled were rampant. By 1997 the organization had collected over 2,000 union cards signed by migrant workers requesting the collective representation of FLOC. With this support, FLOC approached the Mt. Olive Pickle Company. They proposed an arrangement modeled after those that had been successful in the Midwest: a three-way agreement between the Mt. Olive Pickle Company, the North Carolina Growers Association, and FLOC. Predictably, Mt. Olive refused the arrangement, stating that since the migrant workers were employees of the farmers who grew the cucumbers they purchased and not direct employees of Mt. Olive, the company was not responsible for the working conditions, housing, or wages migrant workers received. For the next two years, FLOC continued to hold rallies, gather signed union cards and request that Mt. Olive enter the bargaining arrangement. When recognition efforts remained unsuccessful and reports of employee abuse proliferated rampantly, FLOC modified their approach and decided to engage in more extreme tactics.

On March 17, 1999 FLOC launched a consumer boycott of Mt. Olive Pickle Company. Unfortunately, even with this increased pressure, Mt. Olive did not acquiesce to the request of the migrant worker community. However, over the course of five years, the combined support of individual community members and over 300 organizations finally overpowered the corporate giant. In 2004 a tri-lateral agreement between Mt. Olive, the NCGA and FLOC was signed. The agreement covers over 8,000 pickle workers employed on over 1,050 farms in North Carolina. Covered workers now have access to formalized grievance procedures, (thousands of grievance have been processed to date, in many cases awarding back pay of unpaid wages) bereavement leave, better pay, and job security (visa holders who worked a previous season on a particular location and left in good standing are given priority for later employment over new employees).

In addition to securing these employee protections, the agreement outlines a detailed path to employment whereby potential migrant workers go through FLOC to submit their bid for employment in North Carolina. This outlined path to employment creates a space for organizations such as FLOC to be involved in the H-2A visa process, ensuring that their role as a representative and defender of employee rights is not circumvented. In this process, farmers submit requests to the NCGA, stating how many workers they will need for a particular growing season. The NCGA relays this information to FLOC, who recruits workers via a bid-submission process they have established in Monterrey, Mexico. FLOC then processes the employment applications and sends approved employees (based off of seniority) to the NCGA. The NCGA then fills employers’ requests for workers.

On paper, H-2A visa holders are afforded some protections. However, the Department of Labor (DOL) has trended towards decreased levels of enforcement with a decline in the number of the number of DOL wage and hour investigators by 14 percent between 1974 and 2004. Further, it was reported in 2004 that of the nearly 6,700 employers certified to employ H-2A visa holders, only 89 were investigated by the Department of Labor. The migrant agricultural worker community feels this trend is embodies a limited commitment to their rights as such an abysmal government enforcement rate leaves these workers unprotected. In that light, accounts of abuses and enslavement are common amongst workers.

With the DOL unable to protect them, migrant laborers need organizations like FLOC who can utilize collective representation to ensure that employers adhere to required regulations. According to FLOC representatives, the North Carolina agreements were historic in several ways. For the first time since the days of slavery in the South and for the first time in the history of U.S. temporary “guest workers,” agricultural workers had a direct voice in their own working conditions through their union. While the circumstances through which FLOC was able to secure a CBA in North Carolina were unique and likely difficult to apply in other states, the potential benefits of such a system are immeasurable. With this agreement, FLOC has been able to set a monumental precedent for the future of collective representation among agricultural migrant laborers.
Analysis

Recruitment

Both the literature and the North Carolina case point to positives and negatives in the H-2A visa recruitment process. First, there is evidence of discrimination in the recruiting process. Schmitt detailed the trouble some Asian workers face when trying to enter the H-2A visa program. The exorbitant fees Thai workers must pay at home keep numerous eligible workers from seeking H-2A visas. The psychosocial effects of cultural and linguistic isolation also lead fewer Asian workers to return under the visa. Evidence from the North Carolina case corroborates Schmitt’s claims. The strong network of Mexican migrant workers and immigrants, as well as the geographical distance between Southeast Asia and the Southeastern United States, lead many employers to seek Mexican workers. While small pockets of Lao and Thai workers do find their place in North Carolina, entry barriers exist for hundreds left at home.

Unfortunately, the barriers outlined here appear to be outside the control of the visa program itself. Elswick highlights a greater concern. He explains that, once outside United States borders, employers are not required to adhere to United States anti-discrimination law. While the North Carolina case did not show explicit examples of employers abusing the system, this shortcoming can be corrected by best practices. Perhaps the most obvious reason for a lack of abuse in recruiting in North Carolina is the existence of FLOC. The organization, compelled by the interest of the worker and providing oversight, seems like the ideal mechanism for fighting discrimination.

The literature and testimony of experts also decry communication in H-2A recruitment. Testifying on behalf of the Western Growers Association, Tom Nassif outlined the difficulty many H-2A applicants experience. He says that in many cases, workers cannot easily communicate with anyone regarding their application status. Given the short-term nature of the work and the urgency to fill positions, lack of communication causes applicants undue stress. Both Nassif and Guernsey point to the number of agencies involved in application processing and approval as a cause. Guernsey details how multi-agency involvement not only derails communication with applicants, but creates a backlog of applications.

The North Carolina case study does not highlight these problems. Once again, the existence of FLOC is a benefit for applicants. Acting as a regulated intermediary, FLOC can aid potential workers with their applications and keep communication lines open between agencies, employers, and applicants. In looking to improve the H-2A recruitment process, communication should be addressed. Future reforms or legislation should allow for more direct contact for applicants to receive timely information on their application status.

It is very important to note that multi-agency involvement does serve an important purpose in the H-2A recruitment and application process. The Department of Labor, Employment and Training Administration, and Department of Homeland Security work hand in hand to protect the employers, the applicants, and the integrity of the visa program itself. Each agency works to check applicant and employer backgrounds to ensure workers will be treated with respect and employers hire prepared workers. Before completely reforming the system in the name of better communication, a careful cost-benefit analysis must be performed. It may not be worth sacrificing checks and balances that favor the workers in favor of a streamlined and more easily accessible process for applicants. The literature and the client both argue that a process that yields such a high acceptance rate is likely not fatally flawed in the recruitment phase.

A final issue in recruitment is interference from intermediaries or job shops. As the literature review stated, academic research on intermediaries is difficult to uncover. It is a benefit to intermediaries to not be recognized or scrutinized. It is, however, incredibly important for the future of the H-2A program that intermediaries do not unfairly strip migrant workers of the rights or dignity through fees or sub-par conditions. The North Carolina case does not detail intermediary abuse. This should not come as a shock given the strong network of immigrants already living in North Carolina and FLOC’s work. Intermediaries are likely to be strongest in areas where migrant workers and H-2A applicants have few connections and no other outlet to which to turn. Workers, particularly from Mexico and Central America have either returned for numerous cycles in North Carolina or have laid down roots in North Carolina. For first time applicants, FLOC performs the same functions as an intermediary, but without charging fees. The
existence of a regulated, not for profit intermediary makes the recruitment and application process easier for new and returning workers.

The literature and the case study reveal several important themes regarding H-2A visa recruitment. First, problems exist, but they are not terminal. Discrimination, lack of communication, and intermediaries all present minor problems that could be improved with the correct reforms. Fortunately, none of the problems presented are overwhelming. North Carolina’s model of recruitment and administration show some ways in which discrimination, communication, and intermediaries can be solved. FLOC’s work protects workers and keeps them informed on their application status. FLOC itself acts as a regulated and non-profit intermediary that benefits the workers and pressures employers to hold high standards. As the recommendations will indicate, groups operating similarly to FLOC in states around the country will help solve problems in recruitment and improve the H-2A visa program overall. The next section will address our analysis of workplace conditions for H-2A visa holders.

Workplace Conditions

Workplace conditions for H-2A visa holders are incredibly unique in relation to other visa classes, necessitating different attention with respect to health and housing considerations. As previously stated, the major health concerns emerging from the workplace for H-2A visa holders are exposure to pesticides, exhaustion, and psychosocial stress. These issues are not relegated to the workplace, as housing accommodations can exacerbate them. Research of cases in North Carolina highlighted these concerns and yielded several critical findings. Among them are inadequate housing provisions for some H-2A workers, a gap in advocacy for H-2A worker needs and rights, and continued exposure to toxins and other chemicals found in crops. Although complete generalization of these factors to all H-2A workers would arguably be unfounded, several common concerns do emerge from our findings.

With respect to housing, employers must comply with state and federal regulations for accommodations of their workers. It should be noted that the children of seasonal farm workers are most vulnerable to poor housing conditions. Unfortunately, compliance with regulations can still leave the possibility for housing accommodations to exacerbate pesticide exposure, particularly in instances in which housing units are located adjacent to the workplace. Also, the case study of North Carolina revealed multiple instances in which housing units were old, deteriorating, and/or overcrowded. Most H-2A workers live in mobile homes wrought with overcrowding and overwhelmingly lack clothes washers, dryers, and vacuums cleaners. This makes it difficult to keep homes clean and lower the risk of pesticide and disease spread within homes, especially if clothing cannot be washed. Additionally, food insecurity was prevalent among H-2A workers in North Carolina. While this cannot be generalized to all housing conditions for H-2A visa workers, it does reveal several critical findings for H-2A workers.

First, there are housing units that are not in compliance with federal and state regulations. H-2A visa standards call for provision of housing of workers, and this provision must abide by federal and state code for workers. As such, there is clearly a gap from either federal or state entities in ensuring that housing accommodations are up to code. Second, overcrowding increases the risk of exposure to pesticides and prevalence of disease among H-2A visa holders. Although these constraints are temporary as a result of the temporary nature of H-2A work, adequate housing provision is still guaranteed and must be assessed.

Advocating for farm worker families is difficult. There is little leverage for agencies working on their behalf because of the seasonal nature of H-2A employment, and the constraints of H-2A regulations on employers can incentivize the hiring of undocumented workers. This poses a significant barrier to workplace condition improvements for workers, especially in light of the fact that there is often a language barrier for workers and their employers. As such, it would be prudent for the provision of interpreters to serve as an intermediary between farm workers and their employers, ideally conveying the concerns of the workers.

Finally, the critical concern associated with H-2A visa work is the health risks posed by agricultural work. While farm work itself is not overly stressful, there are still psychosocial factors associated with farm work that are unique to H-2A visa holders. Further, the heavy workload associated with farm work can cause deteriorating physical conditions for workers. As farm workers do not rely on machinery and often work with low lying crops such as tobacco, health concerns arise from workers holding postures
for extended periods of time. Simply, the demands of farming create physical maladies because of the nature of the work itself. Exhaustion, exposure to heat, and grueling hours performing physical labor take a toll on workers. All of these medical issues are exacerbated by pesticide and chemical exposure, which is compounded by instances of overcrowding in the home.

These problems certainly create opportunities for farm worker advocacy, particularly in the areas of adequate housing and access to quality health care and services for workers. Unfortunately, each of them are directly tied to illegal immigration, which makes H-2A visa program improvements difficult. In the event employers do not participate in the program, they can hire undocumented workers and not worry about abiding by H-2A visa regulations. This removes political capital from the H-2A visa process, leaving advocacy to specific agencies and organizations or the workers themselves. Since H-2A visas are temporary in nature, this creates hurdles for workers and advocates alike to establish a unified platform that can effectively call for reforms of workplace conditions and compliance with federal and state housing standards. The following section will discuss some of these hurdles from the perspective of collective action.

**Collective Action**

While there is currently a litany of labor protections for H-2A visa holders, the enactment of these regulations is a testament to the fact that when left unregulated, employees can easily fall victim to employer abuses. In addition to the federal regulations and labor laws that have been implemented to maintain the balance of power in the precarious and delicate relationship that exists between employees and employers, the ability to engage in organized labor movements, unionization, and collective action are also imperative in the maintenance of a fair and equitable labor market. This is consistent with the 1948 Universal Declaration of Human Rights that affirmed, “Everyone has the right to form and to join trade unions for the protection of his interest.” While the United States has long recognized the vital role collective action plays in protecting the rights and working conditions of employees, H-2A visa holders are not afforded any of these protections.

Instead, H-2A visa workers are granted a few rights with respect to wages. Wages are minimal at best, and minimum wage requirements are often ignored. In addition, housing, transportation, and worker’s compensation are also frequently substandard. Beyond those considerations, H-2A visa holders are afforded no other protection under US labor law. In order to perpetuate a system that exploits and enslaves an entire group of workers, the United States government has deemed it suitable and acceptable to explicitly exempt H-2A visa holders (along with all agricultural workers) from the National Labor Relations Act (NLRA), the governing piece of legislation that enforces and protects an individual’s right to engage in collective action.

As anecdotal and empirical evidence shed light on the various instances of abuse to which agricultural

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**Top Ten Sending Countries of H-2A Employees**

<table>
<thead>
<tr>
<th>Country</th>
<th>Employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mexico</td>
<td>47,399</td>
</tr>
<tr>
<td>South Africa</td>
<td>1,159</td>
</tr>
<tr>
<td>Peru</td>
<td>900</td>
</tr>
<tr>
<td>Guatemala</td>
<td>179</td>
</tr>
<tr>
<td>Nicaragua</td>
<td>166</td>
</tr>
<tr>
<td>Romania</td>
<td>157</td>
</tr>
<tr>
<td>Haiti</td>
<td>110</td>
</tr>
<tr>
<td>New Zealand</td>
<td>99</td>
</tr>
<tr>
<td>Australia</td>
<td>79</td>
</tr>
<tr>
<td>Ukraine</td>
<td>68</td>
</tr>
</tbody>
</table>
workers were being subjected, it was finally
recognized that exclusion from the NLRA placed
agricultural workers in a precarious position.
This group of workers was in dire need of federal
protection. Fortunately, in 1983 the Migrant and
Seasonal Agricultural Worker Protection Act (AWPA)
was enacted to regulate minimum standards that
pertain to working condition in the agricultural
labor industry in addition to providing protections
such as unemployment benefits and Social Security
coverage. However, the needs of H-2A visa holders
were again disregarded and H-2A visa holders were
specifically exempt from the AWPA, leaving them
without the protection of collection action.

The political climate that endorses this creation of a
group of second-class citizens by effectively conveying
the notion that migrant seasonal agricultural workers
do not deserve protection exposes a xenophobic
mentality among some members of American society.
This creates a marginalized sub-category of employees
who are seen as undeserving of basic human rights
solely because of the work visa they hold.

While detailed demographic information has not been
collected regarding the racial breakdown of H-2A visa
holders, data released by the Department of State
(one of the three federal agencies responsible for the
administration of the H-2A program) regarding the
top ten sending countries for the 2007 fiscal year is
represented in chart form below.

The top five sending countries would fall into
categories that the most recent Census report would
qualify as minority groups. This lends weight to the
already generally accepted position that the vast
majority of H-2A visa holders are minorities. It can
hardly be considered coincidental that this denial of
rights sanctions the virtual enslavement of largely
minority H-2A visa holders. With the support of the
government, some farmers are not drastically
incorrect to believe that, “the North won the War on
paper but we confederates actually won because we
kept our slaves. First we had sharecroppers, then
tenant farmers, and now we have Mexicans.”

H-2A holders must also contend with the binding
nature of their visa contracts. In order to legally
remain in the United States the employee is bound to
their original employer and may not seek employment
elsewhere. Termination of this original employment
contract automatically robs the employee of their
right to remain in the United States, and they are
expected to return to their country of origin of their
own volition or subject to immediate deportation.
This dynamic fosters an atmosphere where employees
are hesitant to voice any grievances against their
employers as they run the risk of exposing themselves
to employer retaliation in the form of termination
and consequently deportation. Given that, employees
have very few legal protections, and risk deportation
if they seek to exercise what limited rights they do
possess. “Guest workers have no choice but to accept
onerous and illegal conditions that would be rejected
by workers who have a union contract or the freedom
to quit and find another job”.

While there are minimal protections inherent in
the design of the H-2A visa program, they are not
enough to ensure that migrant seasonal agriculture
workers are afforded fair wages, safe working
and living conditions, and a level of respect that
should be afforded to all human beings. Instead,
they often fall victim to various forms of abuse,
neglect, discrimination, and arbitrary and malicious
treatment. If the United States truly endeavors to
rectify this flawed system, they must revise certain
elements of the H-2A visa program. Thus, allowing
H-2A visa holders the protections afforded by
protected concerted activity would be a monumental
step in the right direction. While it is an exceptional
case, the tri-lateral agreement between FLOC, the
NCGA and the Mt. Olive Pickle Co. provides an
understanding of the elements that would be needed
to implement similar agreements in other parts of
the United States. The recommendations section
includes a detailed breakdown of what these elements
would be in addition to other suggestions for the
improvement of the H-2A visa program. Before those
considerations can be addressed, the following Labor
Market section highlights the economic factors that
are in play for the H-2A visa.

**Labor Market**

The agricultural sector of the U.S. economy is
unique in two ways. First, undocumented foreign
workers are overrepresented because agricultural
work functions as an entry point in the U.S. labor
market. Second, agricultural workers are subjected
to numerous hazardous working conditions and
frequent gaps in employment. Although traditionally
seasonal in nature, recent developments have shown
a trend toward year-round employment. This trend
has implications for a visa structure designed to
provide temporary foreign labor for the agricultural
industries. Overall, this sector employs less than 2% of the labor force, with farm workers accounting for approximately 33% of the total agricultural labor force.86

Undocumented or unauthorized immigrants account for about 5% of the U.S. labor force, but are overrepresented in labor-intensive industries requiring low-skill labor. Moreover, they tend to be concentrated in certain regions of the country and their departure would have an immediate impact on the associated agricultural industries. By one estimate, they represented 25% of farm workers in 2008.87 Unlike other visa programs, the number of H-2A visa is uncapped. The fact that the use of these visas remained fairly constant between 2002 and 2007 while the use of unauthorized workers rose is an indication that the visa program is not responsive to the needs of industries. It is also an indication that there are disincentives for the growers either in the form of the cost associated with the program, the design of the program or the ineffectiveness of federal enforcement policies, including growers utilizing undocumented workers.88 Individual states have established their own enforcement policies. For example, Georgia has chosen to address issues of undocumented workers by increasing penalties on employers for hiring these workers and more stringent requirements for driver’s licenses. 89

**Relevant Components of Labor Market Studies**

A range of studies has been conducted on the impact of foreign workers on domestic workers. These studies have been conducted on national, regional, and local levels. The primary focus is on the national labor market, less frequently on the individual states, and rarely on the agricultural sector of the economy. Differences in approaches, including the application of economic theory and methodologies, have resulted in a wide range of conclusions and little consensus. Each type of approach comes with its own set of assumptions, limitations, and advantages. Studies vary in the data sources used, the operationalization of measures, the unit of analysis, the markets analyzed, and the definitions of workers.

The primary components of interest in existing studies include the theoretical position, definitions of key terms, measures, and data sources. A variable may identify and define subgroups within the category of agricultural workers based on their legal status, citizenship, or mobility. Data sources allow researchers to operationalize measures. However, there are limitations based on how and what information is collected. For example, the Farm Labor Survey (FLS) estimates the number of hired farm workers per year. Because the data is cross-sectional, a snapshot taken at various times of the year, it may not fully account for the seasonal nature of a portion of the workforce, resulting in an underestimation. If the number of farm workers is significantly higher, which is likely, analysis utilizing this data will be flawed. Unfortunately, the adequate and continuous supply of foreign agricultural labor has hindered testing of the assertions by economists, farm advocates, grower advocates, immigration specialists, and other interested parties.90 This complicates debates regarding the implications for the H-2A program, the related immigration policy issues, and potential remedies.

**Studies of Labor Market Impacts**

There are a number of considerations when looking at the impact of foreign workers on domestic workers in the agricultural industry. The primary question is related to the existence of a labor shortage and the resulting impact of wage rates and working conditions. There may be regional and local differences, in terms of the composition of workers, e.g. documented, undocumented, migrant, and domestic, the type of agricultural products, e.g. fruits, nuts, tobacco or apples, or the amount of mechanization for a given product, e.g. labor versus capital intensive. Worker characteristics include the skill level of the labor population, the mobility of all workers either geographically or in non-agricultural industries. Additionally, because some H-2A and migrant workers settle in an area or return to the same areas, there may be the development of immigrant communities and social networks. These provide access to resources through similar, e.g. Spanish speaking, workers such as knowledge about available employment in non-agricultural labor markets. These and other factors contribute to varying perspectives about the ability of foreign workers to function as substitutes for domestic workers in the United States (displace).91

**Economic Theory**

The impact of foreign workers can be viewed from the
perspective of the foreign workers, domestic workers, and producers. Equilibrium in a labor market is achieved through the interaction of workers and producers where the quantity of labor demanded by producers is matched to the quantity of labor supplied by individuals. The excess supply of labor may drive down the price of labor, in the form of wages, for either or both domestic and foreign workers. For foreign workers, income from the lower wage in the United States is still higher than a wage in their home country, generating personal wealth. For domestic workers this produces an adverse effect because in the absence of foreign workers, producers would need to raise wages and/or improve working conditions to attract the domestic workers. Consequently, their wealth is reduced. For producers, the benefit of lower wages is a lower labor cost that generates higher income or profit.\(^\text{92}\)

This is the simple case, but other considerations such as foreign labor as a compliment or substitute to domestic labor, labor supply elasticities, and wage differentials complicate the analysis and lead to different conclusions. Growers and their advocates argue that foreign workers do not negatively impact domestic workers because they do not compete for the same jobs. Thus, foreign labor serves a complementary function. Agricultural jobs are arduous, seasonal, and undesirable to domestic workers.\(^\text{93}\) Because domestic workers have no interest in these jobs, there is an unmet labor demand supplied by foreign workers.

Farm workers and their advocates argue that growers keep wages and working conditions artificially low. In the case of domestic workers, the excess supply of labor provided by foreign workers provides disincentives for growers to improve working conditions, make technological advances, and raise wages in order to attract domestic workers. Thus, foreign labor serves a substitute function. In addition, growers take further advantage of documented and undocumented workers. Because documented foreign workers are tied to employers through the H-2A visas and undocumented workers are not authorized to work, these agricultural workers do not receive full protections. Growers pay lower wages, fire workers who suffer injuries or complain, and provide substandard working and living conditions.\(^\text{94}\)

A further consideration for the H-2A program is that the workers are unskilled and that wage effects may differ based on skill level and mobility. For example, there may be a wage decline for high school dropouts or domestic manual labor. Domestic workers may respond to an influx of foreign workers in a number of ways. Two examples include changing geographic location or moving to a different industry/occupation. If these workers are highly mobile, this may occur prior to and subsequent to the influx, where workers can respond if they believe foreign workers are coming into an area or in response to the presence of foreign workers. Examples of the impact of immigrants on low-skilled workers include displacement and reductions in the employment rates for African-American men in metropolitan areas such as Chicago and Atlanta with an influx of workers from Mexico.\(^\text{95}\)

There are differences between documented and undocumented workers. Undocumented workers account for only a portion of immigrant workers and have more limited opportunities, lowering the elasticities of labor supply, resulting in them being a less expensive factor substitute for native labor of similar skill. This lower elasticity of labor supply has implications for wage differentials between documented and undocumented workers. Areas with larger concentrations of undocumented workers will raise the opportunity for firms to exercise their power and keep wages of undocumented workers low.\(^\text{96}\)

**Data Sources and Estimation Challenges**

Beyond identifying an appropriate measure or proxy for a variable, analyst must contend with data integrity issues and data collection issues. General discrepancies in data result from variable sample sizes, survey respondents (workers or employers), and the identification of different groups of farm workers. There are a number of data sources used for estimating documented and undocumented agricultural workers and other related measures:

- Immigration Statistics for the Department of Homeland Security
- U.S. Census Bureau Data, e.g. American Community Survey (ACS) and the Current Population Survey (CPS)
- U.S. Border Patrol Information on Unauthorized Migration
- Mexican Migration Project (MMP)
- Legalized Persons Survey (LPS)
- New Immigrant Survey (NIS)
Overview of National and State Labor Market Studies

National and state studies cannot parse out the full impact of authorized and unauthorized foreign workers on agricultural and non-agricultural labor markets. Data collected by U.S. Census does not solicit information about the legal status of respondents. Each type of study has advantages. National studies can account for migration, as the labor force is generally mobile both within and across states. But, state studies can account for the disproportionate impact of foreign workers located in concentrated agricultural markets or in areas with a larger percentage of H-2A workers. A survey of existing literature reveals that studies have failed to find a nationwide labor shortage in the past decade. A GAO report examined the labor market in the 1990s. A nationwide survey revealed high unemployment rates at the national and state level in the areas of crop or livestock production. The report also examined individual counties that were heavily dependent on these industries more closely. The unemployment rates were above those for the rest of the country. This suggests that the presence of both authorized and unauthorized workers contributes to a labor market surplus. But the fact that these workers represent such a small portion of the U.S. labor market makes the overall impact negligible.

The exception to this trend is labor markets that depend more heavily on H-2A workers in the tobacco, fruit, vegetable, and grain industries in states such as North Carolina, Virginia, Kentucky, Idaho, California, and Texas. A survey of literature about individual states reveals the limited nature of research at the state level. A comprehensive, not exhaustive, search identified labor market analysis in Virginia, Arizona, and California. The Arizona study found that new immigrants competed for jobs most directly with other recent immigrant groups, not with domestic workers. In addition, Maricopa County was disproportionately impacted by immigration. Although national studies are prominent, Harry J. Holzer advocates for a focus on state level variations including local economic conditions and state employment rates to inform the research and allow for an appropriate evaluation of the impact on individual labor markets.

Guest worker Programs and Immigration Reform

Due to the lack of direct measures and the continued
presence of foreign workers, it is difficult to establish labor shortages or identify adverse effects on domestic workers. Estimates of unauthorized workers range from 30% (about 11.1 million) to 37% of the workforce. On either a macro-level or a micro-level, national and state studies are contradictory. Some studies contend that foreign workers do not impact domestic workers at all. Other studies contend that foreign workers have a negative impact on low-skill and uneducated workers and a positive impact for skilled workers and agricultural producers. A final group of studies contend that new immigrants compete with recent immigrants and may impact domestic workers when they improve their language skills and social networks. Farm labor advocates contend that a reduction in the labor supply will force growers to introduce labor-efficient technologies and management practices and increase wages. This group asserts that the labor factors in the form of wages account for a small portion of the price determination for fruits and vegetables. Unauthorized workers are attractive to growers due to their reduced bargaining power with regards to wages and working conditions. Thus, strong regulations and guidelines such as labor certifications, housing allowances, and mandatory inspections of housing by SWA’s ensure worker protections are maintained. As a corollary, because H-2A visa attach a worker to a specific employer, authorized foreign workers also have reduced bargaining power and face losing employment opportunities.

Grower advocates contend that the presence of foreign workers signals a labor shortage. They assert that mechanization will not work for certain crops. Moreover, higher wages will reduce farm employment because the higher prices required for agricultural products will make the U.S. industry uncompetitive in world markets. In reference to H-2A workers specifically, grower advocates support reduced restrictions for obtaining the visas based on the inability of the program to respond to needs in local agricultural industries. Moreover, the investment of time and money discourage the use of these visas by farms with smaller acreage, receipts, and resources.

Besides estimating labor market impacts without the benefit of direct measures and determining how outcomes match the predictions of economic theory, stakeholders need to closely examine the goals of the guest worker programs and its relationship to immigration policy. Two approaches include a general economic theory perspective and a U.S. agricultural labor market perspective. Martin Ruhs identifies “policy decisions on three fundamental questions: (i) how to regulate the number of migrants to be admitted to the country; (ii) how migrants should be selected; and (iii) what rights should be granted to migrants after admission.” The answers to these questions depend on the selection and/or prioritization of various policy objectives. These include a wide range of economic and other goals such as: maximizing overall economic benefits and minimizing distributional costs for the pre-existing population; maintain social cohesion and national security; complying with international human rights treaties and/or maintaining a certain minimum level of rights for all residents in the receiving country; and maximizing the benefits of migrants remittances and minimizing the costs arising for the loss of skilled workers (‘brain drain’) for sending countries.

In addressing these questions, Ruhs focuses on “maximizing the overall income gains and minimizing distributional effects for existing residents.” Economic theory supports selecting skilled workers over unskilled workers because the former pay higher taxes and utilize fewer welfare benefits. He acknowledges there are justifications for admitting temporary low-skilled workers in specific sectors and occupations. Unfortunately, this can restrain wages and discourage worker training and investment in less labor-intensive production technologies. An assessment of the impact of foreign workers includes fiscal effects defined as benefits in terms of the taxes mentioned above and in terms of costs in terms of use public services and benefits mentioned above. The remedy highlights the practical problems with implementing policies. Ruhs recommends a per-migrant tax levied on the employer to mitigate potential fiscal effects and/or negative income effects for residents. But identifying the associated benefits and costs associated with a foreign worker is not straightforward. In addition, this remedy requires an enforcement mechanism to ensure employers do not deduct the tax from the wages paid to foreign workers.

A final relevant consideration addresses the issues with working conditions both for foreign and domestic workers. The negative impact of guest worker programs is delineated in the Southern Poverty Law Center’s report entitled, Close to Slavery: Guestworker Programs in the United States. Ruhs identifies the importance of providing labor market rights and social rights to foreign workers. In order to avoid adverse effects on domestic workers and foreign workers themselves and to ensure market efficiency,
visas should not be tied to specific employers. Ruhs advocates allowing foreign workers the right to change employers within specified sectors and/or occupations. This right may be granted immediately or shortly after foreign workers arrive in the country. The exercise of social rights entails access to public housing, public education, and public health services. The tradeoff is then between providing extensive rights to a small number of workers or restrictive rights to a large number of workers. The latter case is problematic in more extreme cases such as the provision of emergency services. Ruhs provides the example of creating a disincentive for seeking health care for an infectious disease in the absence of health-care benefits.  

Whereas Ruhs is focused on European cases, the Farm Foundation applies these concepts directly to the U.S. market. Their report identifies four options for immigration reform and summarizes the overarching issues. The four options include the status quo, enforcement mechanisms, enforcement mechanisms and guest workers, and enforcement mechanisms and legalization. The first option results in a stable foreign labor supply. The second option results in additional labor costs. The third option results in a decrease in unauthorized workers but a potential increase in labor and the expansion of labor-intensive industries. The final option results in population changes in rural areas. If mechanical aids and new mechanization techniques arise, these workers will stay in the jobs longer.

The report also identifies difficult issues that need to be addressed within the context of the contending stakeholders’ positions. The first issue is related to food security. Latino workers represent approximately one-seventh of the labor force and seven-eighths of crop workers. The second issue is the gateway effect of agricultural labor for foreign workers. The estimated turnover rate for agricultural workers is at least 10%. The third issue is the unique features of rural and agricultural areas. As noted above, some areas maintain high unemployment rates, some areas draw foreign workers to non-agricultural industries, and other areas absorb workers in agricultural and non-agricultural jobs that are unattractive to domestic workers. The resulting questions include:

- “How fast is dependence on newly arrived immigrants spreading in rural America? What are the implications of an immigrant-dominated workforce in the U.S. food system?”
- “Could farm workers be kept in agriculture longer, with higher wages and benefits justified by experience and more efficient labor markets, or will the farm labor market continue to act as a revolving-door for newcomers?”
- “What happens to immigrants and their children in areas of population expansion, decline, and persistent high levels of unemployment?”

The Farm Foundation asserts that research can provide a method for identifying characteristics of employers, migrants, and communities associated with the integration of migrant workers. Further empirical analysis at the state level utilizing the tools such as Ruhs’ economic construct may assist with addressing these questions. A repository of the experiences, studies, and assessments of agricultural labor markets in individual states may inform future guest worker programs and immigration policy.

As the previous sections have focused on workplace conditions, recruitment, collective action considerations and an analysis of the labor market for H-2A visa holders, the following provides our recommendations for improvement of the H-2A Visa program.
Recommendations

With its overall improvement of working conditions, wages, and a mechanism for handling worker grievances, the Farm Labor Organization Committee (FLOC) Collective Bargaining Agreement (CBA) with the North Carolina Growers Association (NCGA) invites further analysis into methods for administration nationwide. However, due to its impact engendering groundbreaking political reform and unique characteristics, the conditions of the agreement are too specific and unique for nationwide application in its current form. As such, this section disaggregates the program and pulls from it tools that either require additional attention for research, or can be applied on a multi-state basis. Concomitantly, our recommendations do not address how to increase employer utilization of the visa program. Any conditions that would increase their participation in the program without significant moderations to safeguards programmed for sustained worker rights would necessitate paralleling attempts to limit access to the undocumented market, thus requiring comprehensive immigration reform. Based on our analysis of the North Carolina Agreement, this section provides the following recommendations for the current H-2A temporary agricultural visa:

• Comprehensive, state-by-state analysis of the FLOC-NCGA Agreement.

• Regulation of intermediaries.

• Elimination of the system that binds workers to employers.

• Creation of a Bi-Partisan Research Organization.

Recommendation 1: Comprehensive State-by-State Analysis

Due to the unique history and characteristics that engendered the FLOC-NCGA Agreement, it is imperative that further research examines whether certain CBA tools can be used nationwide, or if the agreement characteristics can be disaggregated and then applied to states with similar characteristics to those of North Carolina. While it is beyond the scope of this paper to administer such an analysis, we highlight (1) specific structural elements of the agreement that enhance its success and (2) statewide attributes with potential for a strong framework for implementation of the revised program.

FLOC-NCGA Agreement Tools

When disaggregated, the FLOC-NCGA Agreement presents three tools that demonstrate potential for integration into the current H-2A program structure to enhance its abilities to strengthen worker rights and increase employer incentives: a safe grievance mechanism, domestically registered intermediary, and localized means of data collection.

First, the FLOC-NCGA allows for workers to have access to more than one employer. The Southern Poverty Law Center highlights that one of the primary problems with the H-2A program is the employer’s power to “[hold] the deportation card.” While the agreement does not change the clause bequeathing one employer a majority of rights to the employee’s visa status, the presence and collaboration between FLOC and NCGA help dilute the visa holding power of the employer. More specifically, FLOC provides representation to both the employer and the Growers Association when filing grievance, which inserts the presence of a mediator that increases worker protection. Furthermore, because the Growers Association consolidates employers, it acts as a “bank” of job prospects willing and ready to hire H-2A workers. The ability of the FLOC-NCGA agreement to work around the employer-tied visa system provides a successful method that increases the conditions under which workers can report grievances.

A second tool that the FLOC-NCGA agreement demonstrates is a method for regulating intermediaries. The FLOC office in Mexico acts as an intermediary that communicates directly to the FLOC office in North Carolina, which coordinates and negotiates with the Growers Association. Because the FLOC office is registered in both the United States and Mexico they must obey US discrimination laws and employment policies. Without such U.S. based registration, intermediaries can discriminate workers in ways that would be considered illegal domestically. For example, an intermediary registered within the US could not discriminate based on gender, age, or marital status, while Mexico-based intermediaries cannot only charge large fees for their services but also accept applicants from so-called appealing
candidates, such as married men with strong ties to home. Similarly, the intermediaries can charge high prices for visa and recruitment fees, placing the employee in great debt and arguably in a position of indentured servitude. For example, a Thai company, Million Express Manpower, charged workers transportation costs and recruitment fees of $11,250 in exchange for H-2A visas for agricultural work in North Carolina.\textsuperscript{112} By requiring intermediaries to register within the U.S., they must abide by U.S. employment standards, regulation and monitoring.

The third and final tool offered by the FLOC-NCGA agreement is a localized mechanism for data collection. Since the H-2A visa program requires three different federal agencies (the Departments of Labor and State, and the US Citizen and Immigration Services) there lacks a central locus from which researchers and policy makers can gather data. While it is not in the mission of FLOC to become a large-scale data collection warehouse, the presence of a committee that focuses on labor rights for agricultural, non-immigrant workers allows researchers to identify a point of contact for retrieving grievance information and immigrant information, especially concerning litigation and disputes.

**Criteria for State Participation**

The FLOC-NCGA Agreement is a robust policy support mechanism that allows for smoother and more equitable administration of the H-2A Visa Program. While the structure of the agreement itself demonstrates innovative qualities, the framework in which it exists enhances its effectiveness. In other words, certain qualities within the State of North Carolina allow the agreement to work successfully. This section identifies three attributes to look for in other states when trying to identify possible candidates that would be compliant to a system based on the FLOC-NCGA Agreement: high utilization of H-2A workers, a centralized growers association, and a large agricultural economy.

States recruiting a large number of H-2A visa holders can more easily create a centralized agreement between workers and employers. According to FY1999 data collected by the Department of Labor (DOL), North Carolina utilized the most H-2A visas at 10,279, while the remaining top five states attracting H-2A workers are Georgia (5,845), Virginia (3,856), Kentucky (3,029), and New York (2,304).\textsuperscript{113} As these figures suggest, North Carolina dominates the H-2A market with nearly twice as many visas as Georgia, which provides the second highest number of visas. However, due to the relatively high number of visas provided, these top five states may be potential candidates for an agreement modeled off the FLOC-NCGA agreement.

Another characteristic of North Carolina that allows for the success of the FLOC-NCGA agreement is the presence of one, centralized growers association. In many other states, there are multiple associations, divided by region (e.g. Northern California Growers Association, Western Growers Association) or by crop (e.g. Cape Cod Cranberry Growers Association). The presence of the NCGA, however, allowed for workers to target one entity that represented farmers. The risk of integrating too many growers associations is that it fractures the subject to which the farmers contest disputes and report grievances, diluting focus. Future research must identify states with or with potential for a centralized growers association.

The final characteristic unique to North Carolina that allows for a prosperous agreement is their large agricultural economy. According to the U.S. Department of Agriculture (2009), North Carolina ranks as the 11\textsuperscript{th} largest exporter of agricultural goods, valued at $2,879,000,000 while leading as the top exporter of tobacco at $601,800,000.\textsuperscript{114} As Table 1 indicates, high export states such as California, Iowa and Illinois could be contenders for and agreement similar to FLOC-NCGA, due to their large agricultural economy. This is illustrated by the chart on the next page.

In addition to simply exporting and yielding high gains from agriculture, the type of product allows for increased accessibility to such an agreement. North Carolina’s agricultural industry and lax mechanical utility requires large acreage of farms and is highly labor intensive. While employers have access to H-2A visa employees through the alternative means, most utilize the NCGA despite the fee per employee of $900. According to the Appalachian Sustainable Agriculture Project, employers utilize the NCGA because of its familiarity with program policies and practices.\textsuperscript{115} As such, it must be economically more efficient for the employer to utilize the growers association to access H-2A workers, and moreover farms must be large enough and require the physical labor necessary to justify large-scale H-2A recruitment.
Table 1 State Agricultural Exports, Estimated Value by Millions (USDA ERS)

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<thead>
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<td>California</td>
<td>9,354</td>
<td>10,486</td>
<td>11,313</td>
<td>13,353</td>
<td>12,499</td>
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<td>Iowa</td>
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<td>4,178</td>
<td>5,259</td>
<td>7,870</td>
<td>6,486</td>
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<td>Illinois</td>
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<td>4,723</td>
<td>7,560</td>
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<tr>
<td>Nebraska</td>
<td>2,821</td>
<td>3,219</td>
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<td>5,930</td>
<td>4,826</td>
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<tr>
<td>Texas</td>
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<td>6,042</td>
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<td>Kansas</td>
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<td>3,114</td>
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<tr>
<td>Minnesota</td>
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<tr>
<td>North Dakota</td>
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<td>North Carolina</td>
<td>1,802</td>
<td>2,060</td>
<td>2,068</td>
<td>3,107</td>
<td>2,879</td>
</tr>
</tbody>
</table>

**Recommendation 2: Regulation of Intermediaries**

In its current form, administration of the H-2A visa relies heavily on the intermediaries that recruit workers, assist with application paper work and connect workers to employers. As the above section outlines, the dependency between intermediaries and workers can ultimately harm the employee, placing them into great debt and making them vulnerable to the intermediary. Additionally, intermediaries not registered within the United States have the ability to discriminate or shop for workers. Such hiring practices would otherwise conflict with discrimination laws.

One method of eliminating the risk of endangering the worker and adhering to U.S. based antidiscrimination practices is to require all intermediaries to be registered within the United States. While the details of the registration process and administration of such a program remains outside the scope of this report, further research into an intermediary program based within the United States would increase the safety of employees while also allowing for a heightened sophistication in data collection concerning the role of intermediaries in the H-2A program.

**Recommendation 3: Eliminate Employer Binding Agreement**

The H-2A visa program bestows upon the employer the power to provide and take away workers’ visa. As such, the employer has a disproportionate amount of power and can threaten to take away the workers’ visas at any time. The Southern Poverty Law Center suggests that most abuses reported stem from this power imbalance. They cite that the most common occurrence is the confiscations of identity documents, such as passports and Social Security cards to ensure that workers stay with their employer throughout the course of their contract. Similarly, this power imbalance engenders instances in which workers live in fear that they will be “blacklisted” from other employers, preventing them from reporting complaints or criticizing their employers. The infamous case unveiling the “1997 NCGA Ineligible
for Rehire Report” that cited 1,000 undesirable employees as determined by members of the North Carolina Growers Association further stresses the value in eliminating the power of employers to their employees’ visa status.

An evaluation and alteration of this system that ties the worker to their employer would greatly improve the visa program. As discussed in the first recommendation, a state or regional “bank” of employees mediated by a government body (e.g. Department of Labor) would allow employees the freedom to choose amongst employers, returning them to a labor market similar to the free market labor model that exists for domestic workers. More importantly, however, the employers’ power over their workers’ visa status must transfer to another, less biased government entity. It is only by leveling out the power relations between the employee and employer can true H-2A reform exist.

**Recommendation 4: Nonpartisan Research Organization**

There currently lacks a consolidated research clearinghouse that collects data for the H-2A visa program. While the Department of State offers preliminary statistics concerning the national origin of visa holders and numbers accepted and denied on an annual basis, the dearth of more detailed figures prevent researchers providing substantial conclusions based off of sophisticated quantitative analysis.

A nonpartisan research organization, similar to the structure of the National Conference of State Legislatures, would allow for an unbiased body to collect detailed and sophisticated data from which both localized and comprehensive immigration reform can ground itself. Additionally, because the H-2 program functions so uniquely between states, such a body could include a collection of “best practices” at the state level, allowing state administrators to easily access policy tools used by other states and set a general status quo for non-immigrant temporary immigration policy. A nonpartisan research organization would enhance both the availability and quality of information concerning each visa program, allowing policy makers and researchers to make the most informed reform decisions.
Endnotes

1 “Farm Workers Organization,” http://www.farmworkers.org/bracerop.html


9 Ibid.


11 Ibid.


13 Ibid.

14 “Migrant Clinic Migration Patterns”, http://www.migrantclinician.org/migrant_info/migration_patterns.php


http://www.nc-climate.ncsu.edu/climate/ncclimate.html#factors


Ibid.

Ibid.


FLOC WEBSITE


Ibid.


Ibid.


Ibid.


Universal Declaration of Human Rights 1948

2001 Congressional Research Report

2001 CSR


Litany of Abuses


Rural Communities.” Farm Foundation. (8):1-4.


H-2B
Executive Summary

Our review of the H-2B visa program included an extensive literature review that consisted of an initial program history, an analysis of employer and employee application steps and requirements to enroll and participate in the program, and major legislative and program changes that have occurred during the past five years.

During our examination of the program steps, the importance of intermediary bodies and the roles that they play creating connections between employers and potential H-2B employees are significant. Our investigation determined three types of intermediary bodies: employee-based, employer-based, and ambiguous-based. Each intermediary type was divided according to their sources of funding with ambiguous-based bodies having no clearly recognized source of funding. Unfortunately, despite the existence of some legitimate organizations, many have been witnessed to clearly violate program requirements and become a primary avenue for abuses. These abuses are seen to materialize in the form of exorbitant service fees which indebted worker-applicants, a practice that is not permitted under Subpart A.

During our analysis, four types of abuses were commonly identifiable among employers. First, employers have often submitted fraudulent application documentation, applications for unneeded labor, and overlapping H-2B applications that intend to fulfill a year round position. Second, a category of general abuses was identified that includes substandard workplace conditions, threats against H-2B workers job security, and the illegal confiscation of H-2B immigrant visas by their employees. Third, employers are often found to charge H-2B workers excessive fees, providing subpar housing standards at rent rates high above market value, and unfairly garnishing workers paychecks for visa, broker, and transportation costs. The final and most frequent form of abuse pertains to wages. Often H-2B employees are paid significantly less than an occupation’s prevailing wage, and are not paid for overtime hours worked.

H-2B worker wage abuses are a chief concern of the program. In January, the Department of Labor (DOL) instituted a new Final Wage Rule mandating that employers pay H-2B workers the highest of three wages: prevailing wage (as established by either OES, the collective bargaining agreement, or the Davis-Bacon Act/Service Contract Act), the federal minimum wage, and the state minimum wage. Our investigation required the conduction of a gap analysis between H-2B worker wages and occupational prevailing wages determined by OES in the six states of highest H-2B worker populations. This analysis revealed that H-2B workers are, in general, paid between $0.37 and $5.69 per hour less than the average occupational prevailing wage. Most wage differences were identified as statistically significant within the 5% level. Based on historical H-2B program and OES wage data, during FY2010 most H-2B employers did not pay amounts comparable to wages now required under the new Final Wage Rule, resulting in a cheap labor alternative that produce market inefficiencies. Since H-2B employers have historically underpaid H-2B workers, it can be assumed that this area is the greatest avenue for employer abuses to occur; therefore it is our recommendation that additional oversight be provided to ensure that the new Final Wage Rule is enforced on the state-level.

Our economic analysis revealed that the introduction of the H-2B program could drag down overall wages paid to U.S. workers. This occurs since the program acts to artificially increase the supply of labor available for a U.S. occupation. Our analysis also examined the implications of this increase of supply in both boom and recession economies. The resulting effects of program inclusion are imbalances in the American labor market. This analysis naturally transitions into the need to reassess the current H-2B program cap, which is arbitrarily set at 66,000. We believe that the program cap ought to be reevaluated so that it reflects the annual state of current U.S. economic and employment conditions. To rectify this problem, it is our opinion that the program cap amount should reflect the annual State Workforce Agencies assessments of their state and regional economic and labor market needs.

Our case study analysis investigated the Temporary Non-Agricultural Employment of H-2B Aliens in the United States: Proposed Rule, released on March 18th 2011. Our investigation of this bill identified areas of appropriate program requirement support. Of specific importance is the move to replace the current attestation process with a front-end compliance based system in which documents are required to prove employer need prior to being granted approval for H-2B workers. Our analysis also identified bill inadequacies where additional regulations could be added to further enhance the integrity of the H-2B program.
Our examination of the H-2B visa program has brought to light the following recommendations. It is our joint opinion that these measures ought to be enacted in order to strengthen the integrity of the H-2B visa program. Also, as funding is always the key challenge when attempting to adopt and implement new processes, we have outlined several sources of funding that could be made available through the implementation of our recommendations.

H-2B Program Recommendations:

- Oversight Creation and Strengthening the Application Process
- Creation of an Oversight Division within the DOL and SWAs to Enforce Program Guidelines on the State-Level
- Implementation of Employee Protection Measures, Including the Creation of an Employee Complaint Mechanism for H-2B Workers to Anonymously Identify Abuses
- Enforcement of the new Final Wage Rule: Creation of an Employer Ranking System Based on Audits and Transgressions Against H-2B Workers
- Creation of an Intermediary Body Application Process with Firm Requirements for Program Participation
- Creation of a U.S. Job Database for the Long-Term Advertising H-2B Job Opportunities to the American Workforce to be Maintained by the SWAs
- Offering of Legal Arbitration Services to H-2B Workers Suffering from Abuse
- Funding Opportunity Enabling Oversight Creation
- Implementation of New Guidelines Enabling H-2B Worker Mobility and Tracking Opportunities to Prevent Worker Overstay
- Modification to the H-2B Program to Insure that the Program Only Employs Necessary Temporary Specialty Labor
- Reassessment of Program Cap to Reflect Actual American Annual Economic and Labor Market Conditions

Literature Review

Program Overview

The H-2B visa program is a non-immigrant worker program that enables employers to hire temporary foreign labor for non-agricultural services on a one-time, seasonal, peak-load, or intermittent basis. Examples of some of the industries that employ H-2B workers are “hospitality workers, hotels/motels, chefs, resorts and theme parks, ticket sales, cruise ships, construction workers, maintenance, janitorial, ski resorts, landscaping, golf courses, water parks, security, ride operators, restaurants and bars, warehouse, [and] retail stores.” Other industries include forestry, amusement parks and leisure facilities, and seafood processors. While mom-and-pop size businesses are those that are most often cited as needing H-2B workers, in actuality most workers become employed by mid- to large-size companies.

Employers filing for H-2B labor must apply and receive a temporary labor certification in order to contract H-2B workers for a future position that the employer does not expect to be able to fulfill with domestically available workers. The H-2B program, which enables the contracting of nonagricultural temporary foreign labor, has changed drastically since its inception in 1986 as part of the Immigration Reform and Control Act and its departure from the H-2A program. These changes are noticeably reflected in the rise in numbers of visas issued, soaring from 62 in 1987 to 15,706 in 1997 to the program’s all time high of 129,547 in 2007. Despite these high numbers, this visa is capped at 66,000 annually. The high numbers witnessed in 2007 are a result of the Save Our Small and Seasonal Business Act (SOSSBA) which failed to include returning H-2B workers in the program’s total cap from 2005 to 2007. Returning H-2B workers are workers who have renewed their visa contract and received an employment extension from their employer for continued seasonal employment in the United States (U.S.).

The 66,000 visa annual-cap has not been adjusted since its implementation in 1990 and has been reached every year since 2004. The United States Chamber of Commerce supports expanding this program beyond this numerical limit or a return to a policy similar to that in the SOSSBA that does not include returning H-2B workers in this cap amount. In 2005, the Chamber petitioned the House and Senate to authorize a split of the 66,000 cap into two
equal portions issued twice yearly, half on April 1st, and half on October 1st. This measure was ultimately implemented in the Emergency Supplement Appropriations Bill. In addition, “the U.S. Chamber of Commerce list[ed] expanding the H-2B program as one of its Policy Priorities in 2009.”

Through 2014, the U.S. Citizenship and Immigration Services (USCIS) provides exemptions to this cap for the Commonwealth of the Northern Mariana Islands (CNMI) and Guam. Over the past five years, statistics show that H-2B caps are being reached earlier each year. One might expect with the current economic recession affecting the U.S. that requests from employers for H-2B workers would have decreased, but numbers have remained constant.

Within the H-2B debate, there are a number of politicians who have supported expansion of the H-2B visa program and allied themselves with some of the big businesses who typically employ these workers. Rep. Tim Bishop and Senator Barbara Mikulski are two prominent leaders, with many allies. Attempts to renew SOSSBA had 37 co-sponsors and a similar bill had 24 co-sponsors.

**H-2B Program Publications and Releases**

On January 19, 2011 the Department of Labor (DOL) published a Final Rule on Wage Methodology revising how prevailing wages are calculated. When H-2B workers are not paid the prevailing wage for their industry, the wages for their American counterparts can be depressed, as is discussed in the analysis portion of this paper. The Final Rule will be effective for all wages paid on or after January 1, 2012. This wage rule is also intended to ensure that U.S. workers receive first priority under the new wage system. Prior to this change, comments were accepted regarding the Notice of Proposed Rulemaking (NPRM), beginning on October 5, 2010. The Final Rule was created in response to a decision passed by the U.S. District Court for the Eastern District of Pennsylvania, which invalidated the H-2B program’s use of skill levels in determining prevailing wage and its reliance on Occupational Employment Statistics (OES) data. Current calculations used to determine prevailing wage will expire as of June 30, 2011, but will not affect any prevailing wage determinations connected with PERM, H-1B, H-1B1, or E-3 programs.


**Countries of Origin**

Acceptable countries for H-2B visa applicants are Argentina, Australia, Belize, Bulgaria, Canada, Chile, Costa Rica, Croatia, Dominican Republic, Ecuador, El Salvador, Ethiopia, Guatemala, Honduras, Ireland, Jamaica, Japan, Lithuania, Mexico, Moldova, The Netherlands, New Zealand, Nicaragua, Norway, Peru, Philippines, Poland, Romania, Serbia, Slovakia, South Africa, South Korea, Turkey, Ukraine, United Kingdom, and Uruguay. Effective January 18, 2011, Barbados, Estonia, Fiji, Hungary, Kiribati, Latvia, Macedonia, Nauru, Papua New Guinea, Samoa, Slovenia, Solomon Islands, Tonga, Tuvalu, and Vanuatu are eligible to enroll in the H-2B program and Indonesia was removed from the eligible country list. Despite this limited country list, residents of additional countries have received H-2B visas upon application. Acceptable countries of origin are determined based on their adherence to U.S. interests, their level of cooperation with deportation and similar consular issues, as well as their importance to the H-2B program.

Countries granted H-2B visas beyond this accepted list must meet four U.S. interests requirements in order to be considered. First, there must be evidence that the beneficiary has previously been admitted to and complied with the requirements of the H-2A or H-2B programs. Second, evidence must show that the workers skills cannot be met by a worker originating from one of the countries on the eligible countries list. Third, an investigation must be conducted to identify potential fraud, abuse, and risk to H-2A or H-2B program integrity. Fourth, other factors must be considered that might serve U.S. interests.
**H-2B Employer Application Process**

Employers in these industries seeking H-2B workers should begin their application process at least five months prior to their anticipated need. Prior to admitting H-2B non-immigrants, the Secretary of Homeland Security consults with the appropriate corresponding agency, such as the Secretary of Labor, in order to ensure that there are insufficient U.S. workers to perform the applied for position at the time and place requested, and that the presence of H-2B workers will not have any bearing on the wages and working conditions of their American counterparts. The H-2B program is not intended to replace the American workforce, but rather to be used in addition so that jobs temporary in nature can be filled. It is important that the temporary H-2B labor does not replace the American workforce or drive down wages of American workers, for this is not the intention of the H-2B program.

As of January 18, 2009, employers seeking to employ H-2B visa holders must submit an ETA Form 9142, an Application for Temporary Employment Certification, and Appendix B.1 to the DOL’s Chicago National Processing Center (NPC). In addition, employers must include a completed recruitment report that identifies, a) each recruitment source by name; b) the name and contact information of each U.S. worker who was referred for the position; and c) a lawful explanation of why said U.S. workers were denied the position. H-2B visas are issued on a first-come, first-serve basis provided all application requirements are met.

In applying for H-2B visas, employers are not required to submit applications for each individual worker that they intend to contract; rather a general request for multiple un-named workers who will perform the same labor services “on the same terms and conditions, in the same occupation, in the same area of intended employment during the same period of employment” is acceptable. H-2B employers are the contracting bodies for these visas; as a result, an H-2B visa is nontransferable should the worker receive other employment offers or seek opportunities outside of the contracted employer. This condition means that an H-2B employee’s legal status in the U.S. is directly tied to their employment, ultimately enabling an avenue for worker abuse. As H-2B employees do not have the ability to leave an abusive employer if they wish to remain in the U.S., these workers are often subjected to multiple abuses in which they cannot complain for fear of losing their jobs.

As a temporary and seasonal program, H-2B visas are contracted with the understanding that the positions are intended to be temporary. However, despite this clarification, employers may fill positions “whether or not the underlying job is permanent or temporary” in nature. Instead, the process is governed by the employer’s one-time need, a situation that is not intended to last beyond 10 months or recur seasonally. A business’ need is considered seasonal even if the business is only closed for a single season.

A temporary need is confirmed through a four step process. First, the employer must provide a description of his/her business’ history and activities. Second, he/she must provide an explanation of the employer’s employment opportunity and the number of workers requested. Third, he/she must explain how the request for temporary labor certification meets the regulatory standards for temporary need. Finally, if the employer has previously applied for H-2B workers he/she must include a statement justifying an increase or decrease of visas requested.

Under certain circumstances an H-2B worker’s visa may be extended for up three years before requiring them to return to their home county for a minimum of 90 days. Similar limitations exist if the worker resides in the U.S. for a shorter period of time. Less than 18 months of residence in the U.S. requires a 45 day return, and more than 18 months, but less than three years, requires a 60 day return to their home country. Despite these stipulated limits, the Department of Homeland Security (DHS) has no true entry and exit tracking system in place and there is indication that H-2B overstay is a growing issue.

H-2B workers may only be hired on a full-time basis and must be paid at least once per month. Wages are determined as the highest of the Federal, State, and prevailing wages. The Office of Foreign Labor Certification (OFLC) may grant or revoke variances for employer-specific special procedures when there is a recorded and un-provided-for need. Documented examples are in the tree planting, reforestation, and the entertainment industries. The OFLC is also responsible for conducting random audits, imposing supervised recruitment, or barring an employer from the H-2B program. An employer may be barred from the H-2B program if they submit fraudulent documentation, for example.
Before an H-2B visa application can be filed with the NPC, an employer is required to “obtain a prevailing wage determination from the National Prevailing Wage and Helpdesk Center (NPWHC), submit a job order to the State Workforce Agency (SWA) serving the area of intended employment, and publish two print advertisements for the position(s), one of which must be on a Sunday.”

Prevailing wage is determined through an electronic submission to the iCert System, but for advertising purposes, employers reference 20 CFR 655.15 to determine wage rates and 655.17 for advertising guidelines. To advertise the position, the DOL only requires that the opportunity be advertised in a newspaper of “general circulation for 3 consecutive calendar days or in a readily available professional, trade or ethnic publication.” All H-2B application forms must bear the original signature of both the employer and its contracting attorney or agent. No association is permitted to submit applications on behalf of an employer, thus decreasing the opportunity for businesses that are strictly structured to distribute H-2B workers to employers (job-shops).

As part of the Application for Temporary Employment Certification, an employer must attest that he/she will abide by the following conditions:

- The employer must offer terms and conditions normal to, not less than, those offered to U.S. workers employed in the industry.
- An employer seeking temporary employees may not pursue H-2B workers as a replacement for a striking workforce.
- The employment opportunity must have been available to all U.S. workers without discrimination and have been advertised to the U.S. workforce.
- Unions must be contacted should they exist for the occupational position being requested.
- The employer must not have unlawfully laid-off an American employee in a petitioned-for position within 120 days of the needed start date.
- These employment opportunities must equal or exceed the prevailing wage for the duration of the employment, as well as comply with Federal, State and local employment, health, and safety laws and regulations.
- H-2B work may not be commission, bonus, or incentive-based below this wage amount.

Wage amounts are enforced by the Wage and Hour Division (WHD) of the DOL as of January 18, 2009. This department can take action through the federal court system to compel employer compliance. Also, the employer is legally required to specify all paycheck deductions. Employers are not permitted to charge H-2B workers fees related to obtaining labor certification for their employment, nor may they relocate H-2B workers to areas outside that granted in their Application for Temporary Employment Certification. Employers are responsible for notifying H-2B workers that they must leave the U.S. upon completion of their contract as well as provide return transportation if the employee was dismissed prematurely. Should the temporary employment opportunity be terminated, the employer is obligated to notify DOL and DHS within two working days.

Similarly, an employer must consider the position terminated should the employee fail to report for five consecutive working days.

An important stipulation of H-2B visa contraction is that an “employer must attest that it has contractually forbidden any foreign labor contractor or recruiter whom the employer engages in international recruitment of H-2B workers to seek or receive payment from prospective employees.” This stipulation is a measure against indebting H-2B workers to foreign recruiters, but there does not appear to be any enforcement measures in place to guarantee that this has not occurred. Despite this stipulation, employers can overcome the provision by repaying recruiter fees or notifying USCIS within 2 days of having learned about the intermediary payment.

Under current guidelines, the Chicago NPC Certifying Officer (CO) will review all applications and make a determination to certify, deny, or request further information (RFI) based on the employer’s adherence to these criteria. Incomplete applications will be returned to employers within 7 days of receipt and specify insufficiencies as well as a date by which the further information requested must be received. If denied, the CO will state why, address the applicability relating to U.S. workers, and offer the employer an administrative review of the denial by the Board of Alien Labor Certification Appeals (BALCA) within 10 days under 20 CFR 655.33. The CO may also grant a partial certification for fewer employees and/or
timeframe for H-2B workers with the same conditions of a denial. H-2B employment may begin no sooner than the date certification is granted. Certification is intended to support the employer’s USCIS visa application filed under Form I-129 Petition for a Nonimmigrant Worker and limits the number of workers requested to its recommendation.

Once labor certification has been granted, the employer is responsible for retaining the prevailing wage determination, advertisement efforts, appropriate union contact documents, documentation that laid-off American workers were notified of the position, the recruitment report, and supporting documentation entailing the employer’s temporary need for 3 years from its issuance.

Additional information on employer regulations regarding H-2B visa employees, with the exception of the territory of Guam, can be found in 20 CFR 655, Subpart A. An employer who violates his/her H-2B obligations may receive penalties of up to $10,000 USD, debarment from the program, and the payment of back wages to employees by the DOL. Additionally, should an employer choose to falsify labor certification information, Ww is punishable under 18 U.S.C. 1001, subject up to a $250,000 USD fine and/or 5 years in prison.

**H-2B Worker Application Process**

To receive an H-2B visa, workers must accept a job placement offer, sign an employment agreement, fill out and submit an H-2B petition to USCIS, and receive a Notice of Approval prior to visiting their U.S. Consulate. Once these steps have been completed, workers applying for H-2B visa status must visit their local U.S. Consulate, present their application, and conduct an interview. Their application must include a job offer from a U.S. employer; form DS-156 Application for Nonimmigrant Visa; form DS-157 if the applicant is a male between the ages of 16 and 45; the necessary filing fees; a copy of their Notice of Approval for their H-2B Petition; a passport; one passport-size photo; and evidence proving their ties to their home country and their intent to return (financials, deeds, family, and etcetera).

If granted an H-2B visa, the worker may bring their spouse or underage family members with them to the U.S. by means of an H-4 visa with the understanding that they may attend school but are not permitted to work. Once the H-2B visa has been granted by the U.S. Consulate, the officer at the port of entry still has the authority to deny admissions to the visa holder or restrict the duration of their stay. A request for extension of stay is only granted by USCIS. Currently there is no limit in place on how many times a foreign worker may come to the U.S. on an H-2B visa. Also, the State Department does not release refusal rates of H-2B worker-applicants from U.S. Consulates.

A common criticism of the H-2B worker program is that it fails to provide adequate labor protection. Instead there are instances of “wage and hour violations, breaches of contract, denial of medical treatment, and other abuses against workers.” H-2A workers receive protection and benefits that are absent from the H-2B program. An example would be access to funded legal arbitration methods to reconcile H-2A worker abuses.

While it was never intended for the H-2B program to lack worker protection, it nevertheless resulted when the program departed from the H-2A program. Also, the DOL has no response mechanism in place to address worker rights violations.

**Intermediaries**

One area in which there is limited labor protection is the existence and use of intermediary bodies. Intermediaries are the agencies that match up guest workers with employers, sometimes for a fee to the employers (employer-based), sometimes for a fee to the worker (employee-based), sometimes for free (ambiguous-based), and sometimes through a database accessible to employers, employees and other intermediaries. These four types of intermediaries are discussed below.

**Employer-Based**

Employer-based intermediaries charge U.S. employers for help with applying for temporary workers and the recruitment process. An example of one such agency is Express H-2B Seasonal Labor Solutions. Like other intermediaries, Express H-2B highlights the benefit of hiring guest workers by claiming that the individuals hired have a higher motivation to perform well on the job than American workers because they are tied to their employers through a visa. Express H-2B helps employers by offering recruitment tours overseas and by working with “international recruiting partners,” though these partners are not mentioned on the website. The recruitment tours allow employers to travel overseas and interview potential guest workers before hiring them. Furthermore, Express H-2B
recruits not only new guest workers, but returning and in-country workers as well. This agency helps employers with the DOL certification process by using its own immigration attorney to prepare and submit the company’s application to the State Workforce Agency (SWA). It also helps the company advertise in a local newspaper for three consecutive days, as is required, and then submits the recruitment report to the appropriate SWA. Then the immigration attorney helps with the USCIS petition filing. For all of their services, Express H-2B charges employers $475 for regular filing costs and $1,700 for premium filing costs for up to five workers.

Additionally, Express H-2B works with the guest workers and helps them with the consular processing in the workers’ home countries (helps them complete their documentation and prepare them for their interview). They also help guest workers with health and travel insurance coverage, finding housing, accessing transportation, and applying for social security numbers. Express H-2B guarantees that guest workers will have a job placement before arriving in the United States, and that those workers will earn the same wage as a U.S. citizen performing the same position. Workers can enroll with Express H-2B for free.

Another employer-based intermediary is Mas Labor, a self-proclaimed for-profit business that helps employers find guest workers, primarily from Mexico. The organization promotes itself by stating it has the “knowledge and experience to navigate complex H2 government rules and regulations for small business owners.” Like Express H-2B, Mas Labor also promotes returning guest workers, highlighting the fact that they already know the business, equipment, safety procedures, etc., and thus the employer can save money on training those employees. Furthermore, Mas Labor advertises that Mexican H-2B workers will average seven to eight years in the visa program. One reason Mas Labor claims this is that they believe the H-2B program changes lives because Mexican workers want to work hard to provide for their families back in their home countries. As a result, Mas Labor claims that Mexican workers are more motivated than other workers and are dedicated to returning to the U.S. multiple times. Additionally, although Mas Labor works with recruiters in Mexico (and other countries), Mas Labor claims to be a legal way for employers to get matched up with prospective guest workers. Mas Labor charges between $4,100 and $5,300 for the processing fees and advertising fees for up to 10 Mexican workers.

A similar organization, Amigos Labor Solutions, was founded in 1988 to “bring in the best, most productive and reliable seasonal workers possible – when and where they’re needed.” Amigos Labor Solutions also has multiple processing locations in Mexico, but does not elaborate on this point. This agency claims to have a 99.75% success rate, though it does not define what success is. The fees start at $650 per worker for

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**Flowchart 1:** This flowchart represents the major steps taken by potential H-2B employers and employees as they undergo the application process to participate in the H-2B visa program.
4 to 15 workers ($2,600 to $9,750) plus the cost of
the required newspaper ad, USCIS fees, Premium
Processing fees, and Filing and Fraud fees.94

One final example of an employer based intermediary
is USAMEX Ltd., an intermediary that helps bring in
Mexican and Guatemalan workers. They charge a fee
of $2400 for any number of workers that are needed,
plus the DOL fee, a $10 fee for each worker, the USCIS
fee and an ad for a newspaper to recruit American
workers.95 As of September 1, 2006, USAMEX Ltd
stated they believe employers have a poor chance of
managing the visa system on their own because the
visa system is difficult to understand, it is challenging
to satisfy all the requirements for the visa program,
and there is a strict application process.96 For these
reasons, USAMEX suggests that employers use
their agency to help with the application process for
temporary workers.

While employer-based intermediaries are not illegal
because they charge the employer as opposed to the
employee, mention of working with foreign recruiters
is questionable. As long as the foreign recruiters are
not charging prospective H-2B workers for their
services, then employer-based intermediaries working
with such recruiters is legal. On the other hand, as has
been previously mentioned, it is illegal for employers
to engage with a company for recruitment services if
they know the service is charging employees. As can be
seen by the above examples, when it comes to foreign
recruiters very little information is provided, perhaps
leaving the employer in the dark about recruitment
fees and thus free to use the services.

Employee-Based

Employee-based intermediaries charge potential
employees often exorbitant fees to find the guest
worker a job in the United States. According to the
Alliance Abroad Group International Recruiting
Service, new regulations became effective on January
18, 2009 that “H-2B participants are not allowed
to pay a job placement fee or program fee or other
compensation to an employer, recruiters, or any other
party, in exchange for a job or offer of a job in the
United States OR in your home country, in relation
to the H-2B visa.”97 While charging guest workers a
fee is now illegal,98 there are many anecdotes in which
guest workers claim that the practice still exists. Of
particular interest are the recruiters based outside of
the United States, for they are not bound by U.S. law.

These types of recruiters often target the poor, as
they are the most desperate for jobs in the U.S. As
mentioned by the Southern Poverty Law Center in
their report titled “Close to Slavery,”

These labor recruiters usually charge fees to the
worker – sometimes thousands of dollars – to cover
travel, visas and other costs, including profit for the
recruiters. The workers, most of whom live in poverty,
frequently must obtain high-interest loans to come up
with the money to pay the fees. In addition, recruiters
sometimes require them to leave collateral, such as
the deed to their house or car, to ensure that they
fulfill the terms of their individual labor contract.99

Employee-based intermediaries make a lot of money
off of the above type of transactions with potential H-2B
employees. With so much money to be earned, there is
a strong incentive for employee-based intermediaries
to continue their practices of essentially robbing poor
potential H-2B workers. Additionally, the potential
guest workers often know very little about the visa
process and laws, leaving room for the intermediaries
to further take advantage of the workers.

Without
regulation, these intermediary bodies will continue to
conduct business as is.

Furthermore, H-2B employees often arrive in the U.S.
with debt that may exceed $10,000.100 Many guest
workers even pay high interest rates on this debt,
making it very difficult for the worker to ever truly
pay back the intermediary with the money they earn
while working in the U.S. This problem is exacerbated
by the fact that employers may not provide as many
hours of work as is promised by the contract.101

Ambiguous-Based

Ambiguous-based recruiters claim to neither
charge the employer nor guest worker for their help
with the application process of hiring temporary
workers. However, it is unclear how these companies
make enough money to keep their businesses in
operation. One such agency is Alliance Abroad Group
Their website claims that they are a “staffing resource”
for employers and that the workers they recruit will
be committed.102 Moreover, Alliance Abroad Group
advises that they have a “large network of cap
exempt H-2B visa workers” to distinguish themselves
from other agencies.103 This company states they
promote cultural exchange through the H-2B visa
program, with the assumed goal of drawing in
potential workers and employers.
While employers receive free access to guest workers recruited by Alliance Abroad Group, the workers themselves receive free help with their application process. The workers must be at least 18 years of age, have intermediate English skills, and have a high school diploma to qualify for the H-2B program. Workers who are already in the United States who want to extend their visa should apply at least four months before their visa expires, according to Alliance Abroad Group. Not only does this agency help with coordinating the paperwork for the workers, if asked it also helps with finding housing and “access to tax refund services” to recoup the taxes paid in the United States. The Alliance Abroad Group even provides health insurance for the worker if the employee wants to purchase it for $43 a month. Alliance Abroad Group offers this service because the H-2B program does not include medical insurance.

The Alliance Abroad Group guarantees a work placement for the workers prior to their arrival in the United States, and also guarantees that workers will be paid the prevailing wage. However, they do not share how they can guarantee that workers will be paid the prevailing wage or what rights workers have if their employer does not pay this wage. Furthermore, Alliance Abroad Group’s website cites a relatively new regulation that workers cannot pay job placement fees to an employer or recruiter. This agency states that workers may contact them if they have been charged a fee of this sort, but do not lay out the details on how their organization can help workers recoup their costs or file a suit.

Another example of an ambiguous-based recruiter is United Work Programs, a U.S. based company founded in 2003. Like other recruiting companies, United Work Programs claims that guest workers can not only increase diversity for an employer, but they also have good work ethics. Due to the fact that guest workers may only work for the employer on their visa, the employer can count on their workers to be dedicated to their business. United Work Programs offers free recruiting tours for employers with all of their travel and accommodation expenses paid for. These tours may travel to Asia, Europe, or Latin America, and the only requirement for an employer to take part in the free tour is that they have to be able to hire at least 25 H-2B workers. This company does not advertise how they help the guest workers, if at all, other than providing a local coordinator to answer any questions that a guest worker may have.

**Database**

Lastly, there are a few public and private agencies that collect data on employers hiring H-2B workers, and compile this data into a database to be sold to potential workers. One such agency is [www.H2Bjobs.net](http://www.H2Bjobs.net). For a fee, guest workers can access this database that lists H-2B employers and jobs. This website claims to have data on over 11,200 employers and typically charges $59.99 for access to the database. The fee includes data on the most up-to-date information, meaning that an employee would need to buy the database yearly if he/she wished to keep applying for an H-2B visa. Within the database, a worker can sort the information by city, state, company, type of job, wage, season/dates, etc. According to the website, over 94 percent of their customers find H-2B jobs. This company tries to set itself apart by saying there is “no need to pay exaggerated fees to U.S. agencies for getting a placement.” Furthermore, the site claims that workers will save thousands of dollars because they are not paying recruiters from their own countries either, acknowledging this phenomena and using it as a way to draw in potential customers rather than denouncing the practice altogether.

Another database program offered is through [www.h1base.com/content/h2visa](http://www.h1base.com/content/h2visa). This website offers a program that helps guest workers prepare a resume, lists H-2B jobs, and provides interview preparation tips. The listed fee is typically $49.95 a month, but the website now advertises a reduced fee of $19.95 a month. These types of recruitment tools match up employers and employees for the H-2B visa program.

**H-2B Worker Conditions**

In addition to the need for H-2B workers in the U.S. economy, a precursory investigation of the underlying conditions for the workers is necessary. Although the resources offer different views of the need for H-2B workers in the economy and whether these workers greatly impact wages and unemployment, the resulting viewpoint for workers already engaged in the H-2B system point to a flawed process with need for further regulation. The prevailing conditions do not only affect the H-2B workers, but could also lead to a cheapened system through employers circumventing legislation and fraudulently applying for H-2B visas participants. This is due to the innate reliance the H-2B workers have on their employer in order to stay in the country for work and produce a wage.
The literature on the conditions for the H-2B workers before and while they are employed by U.S. companies demonstrates a clear need for further standards and review in fixing the program. This literature that we reviewed delves into the conditions for these workers in various industries, and further explores the lack of understanding between these workers and the rest of the U.S. For the process to be successful, it is supposed to be the case that the employment of an H-2B visa holder does not harmfully affect the wages and the conditions of U.S. workers that work in similar industries. However, in the resulting research, whether or not this holds true is questionable as we look at the conditions for the workers and the process undertaken by employers.

The modern H-2B visa program is being viewed as a mixed source between modern-day slavery and indentured servitude. With no outlook or assistance for becoming a U.S. citizen, documented cases of fraud, and abuse ranging from unpaid overtime to mental pressure, this ingrained abuse suggests that the H-2B visa program is in need of revamping. Furthermore, the level of debt that workers can accrue through underhanded transactions with recruiters that are explicitly forbidden in contracts can disable the workers from collecting a real wage to provide for their families back home or accumulate for themselves.

**Debt Conditions**

*Close to Slavery,* which is written by the Southern Poverty Institute (SPI), provides a detailed look at the H-2B worker program through interviews and research, delivering an interesting view at the level of debt that a worker amasses, and the effect that it has for the workers. With a guess of debt ranging from $500 to $10,000,¹²¹ the H-2B worker arrives with a heavy burden. This debt is charged at an exorbitant interest rate, due to the risk structure inherent for an undocumented low-income worker, reaching extremes of 20 percent each month.¹²² Provisions are not allotted to accommodate the worker for paying back this debt and some leave the U.S. worse off than they came.

The debt that can be accumulated through the process of applying for the visa provides a clear indication of the conditions H-2B workers face. In some research, these workers arrive heavily in debt after having to pay recruiters to get the job in the U.S.¹²³ Not only may debt be accrued, but loans which in most cases originate from the recruiters have to be subordinated or asset-backed, to guarantee their payback. This collateral is usually tied with the houses they own back in their home countries in which their families are still living. Furthermore, their legal status is contingent on the fact that they keep the job for which they obtained the visa, which leads to further reliance for the visa holder on their employer and may result in limited complaints to outside sources even if situations are particularly bad.

Substantial debt is a common occurrence for the H-2B worker. U.S. laws do not currently have regulation that obligates the employers to reimburse the workers for travel and visa expenses.¹²⁴ Although it is rare, some industries do pay the upfront cost. In particular, the U.S. crab houses must pay for these expenses to the workers. However, this payment by the employer is subsequently garnished from the weekly wages of the H-2B worker, so no gain is made.¹²⁵ Recent legislation has required future employers of these workers to sign a contract that ensures an understanding that no transactions between foreign recruiters and H-2B workers exist with respect to charges for obtaining visas. Therefore, if these employers know about these transactions, they can no longer engage in dealings with these respective recruiting agencies. However, this legislation does not fix the apparent loop hole in which employers are able to pay for the procedure and then charge the visa holders after they are employed.

The relationship between the recruiters and the debt conditions of the visa holders is illustrated through a particular case involving Decatur Hotels in 2006. It was found that the workers were responsible for paying up to $5,000 in recruiting fees before they even started their employment, which put them and their families into further debt. The workers then later realized that the wages garnered over their term of employment was not sufficient enough to cover their debt in recruiting fees. Moreover, H-2B workers are unable to find outside supplementary sources of income as this would breach the terms of conditions that are present in having an H-2B visa.

**Employer and Employee Conditions**

The maltreatment of the H-2B visa worker stems from the substantial power that the employer has over the worker. In addition to the nature of the boss and employee relationship apparent in any similar situation, these employers have power in the sense
that at any time they can fire the worker, call the government and have the worker deported with a status of being illegal.

Employers have virtually limitless control, even employing such tactics as taking away important documents from the workers that documented their identity such as passports and temporary social security cards. In such a case, workers are told that it will ensure that they fulfill their terms of the contract. Without the ability to verify their status, the workers are held at a standstill in fear that they could be deported for not being able to show who they are. Furthermore, H-2B workers live in constant fear that if they commit a “bad act” or complain to their employers, the same employers will call immigration and customs and deport them back to their homelands.

In a case examined by the Government Accountability Office (GAO), a Virginia-based employer working within the hospitality industry committed several cases of fraud. The case developed an understanding of the practices in which the employer worked as an illegal labor broker. Furthermore, the same employer, through fraudulently applying for more visas than they needed, contracted several H-2B workers and leased them out to other companies that were unable to obtain them. Finally, the workers were charged extortionate visa application fees and excessive rent for unsanitary and overcrowded buildings.

Wage Conditions

Another source of contention has been wage provisions for H-2B workers. It has been well documented that the wage for the H-2B worker has to be competitive in the economy. As noted earlier, this was established through recent legislation (January 2011) that forced employers to pay these workers the greater of the federal, state, or prevailing wage. However, these forced standards for the minimum wage do not transpire to overtime that the worker may accumulate over the excess of 40 hours. In some cases, workers have been denied allowances for overtime and were therefore restricted. In another case, H-2B employees alleged that an Arkansas-based forestry corporation did not pay overtime wages despite working weeks that regularly exceeded 40 hours. Although the conditions for overtime do prohibit the workers from obtaining their real wages, this situation does not regularly get reported to the necessary authorities.

Conversely, H-2B workers have reported not being able to work the necessary hours they were initially promised in their contract. This has led to a reduction of wages for workers who have trouble finding the necessary hours. The GAO has reported on numerous cases in which employers have fraudulently employed an excess of workers to do the job. The report alleges that “Employers and recruiters misclassified employee duties on Labor certification applications to pay lower prevailing wages; used shell companies to file fraudulent labor certification applications for unneeded employees, then leased the additional employees to businesses not on the visa petitions; and preferentially hired H-2B employees over American workers in violation of federal law.” These dodgy dealings were made in an effort to avoid paying overtime charges to the workers. Moreover, research that indicated that H-2B workers have been attracted over their equally applicable U.S. counterparts have led to outrage and misleading end results where H-2B workers actually are taking U.S. jobs, therefore negatively contributing to the unemployment rate and misunderstanding with Americans.

In addition to their recruitment debt and low prevailing wages when taking into account overtime hours, approximately 54% of the women interviewed in the blue crab industry reported employer deductions from their weekly paychecks for the cost of tools and/or protective equipment. Most common were employer deductions for the cost of knives, gloves, aprons, boots, and hairnets. In some workplaces, the cost of these items was deducted from wages only if the worker requested the item from the employer. In other cases, the employer made accumulated deductions from all employee wages. Employers continued to deduct not only housing, visa applications, and transportation fees from wages, but in some cases subtracted working tools as well.

Results

After analysis of the literature concerning the conditions for H-2B visas, it is difficult to determine whether conditions are actually substantially worse for all of the H-2B workers or whether existing research and case studies magnify the cases of workers with particularly negative experiences. Some researchers point out that the majority of H-2B workers are not actually being abused by their employers. That in fact, the H-2B visa holders have nothing but nice things to
say about their employers when answering questions regarding them.\textsuperscript{133}

A common response bias may have transpired in collecting data. This occurs when data collected only comes from a specific source which would be in this case a collection of disgruntled H-2B workers. However substantial this may be, it is cause for further investigation in the process and consequences of the H-2B worker.

**H-2B and American Workers**

A main question of our research is whether or not the H-2B visa program has affected the conditions of U.S. workers as a whole, either those who work with them, or the visa holders themselves. Through an extensive overview, different views have recorded the impact of such workers in the job pool. The cost to American workers is hard to determine. Although there is not sufficient evidence to support that the American worker who works side by side with the H-2B worker in some industries suffers, there are cases and results in which the American worker might be worse-off due to the details of the program.

In its purest and intended form, the H-2B visa program should not detract heavily, if at all, from the American workforce. Nor should it have an extensive negative correlation on the working conditions that U.S. workers who work in tangent with visa holders face. This is concurrent with the fact that H-2B visas are intended for use in seasonal employment opportunities where widespread searches were conducted for U.S. workers who were sought and not found.

Documented cases of H-2B visa holders taking jobs from Americans have been found.\textsuperscript{134} However, the links between them seem to focus on the role of the employers who have fraudulently tried to acquire these workers with the intent of filling these roles for lower cost. The Economic Policy Institute (EPI) explains that the presence of workers with second-class status reduces the ability of other workers to improve their own compensation and working conditions and can actually worsen them. As the former Secretary of Labor Ray Marshall in the same document states, the “experience in the United States and Europe shows that the short-run economic benefits of guest worker programs are more than offset by long-run social, political, and economic problems. It is not good policy for a democracy to admit large numbers of workers with limited civil and employment rights.”\textsuperscript{135}

In response to labor unions and other interest groups that seek to provoke change in this arena, the DOL concluded that the claims made against employers in which their searching for H-2B workers undermines American worker wages were false. Their economic analysis found that there was insufficient evidence to support these claims. Accordingly, the Chamber of Commerce found that “…there is no empirical support for claims that the H-2B program adversely affects U.S. workers. Indeed, the DOL will not approve an employer’s application for H-2B workers unless it concludes that U.S. workers will not be adversely affected. And shrinking or eliminating the program would likely hurt Americans more than it would help them, reducing job opportunities for U.S. workers.”\textsuperscript{136}

**Qualitative and Quantitative Investigation**

**Competitive Advantage Argument**

The effects of the previously discussed wage and employer conditions on the H-2B workers are more than relevant here. This is due to the inability of these workers to negotiate a wage, benefits, or a contract in terms of dealing with their employers. Given this clear lack of negotiation essentials for H-2B workers, American workers lose their competitiveness. We can further examine this through competitive advantage principles.

When one group of employers employs captive H-2B guest workers who have no ability to raise their wages, it makes it difficult for workers at competing employers to improve their own wages and working conditions, since to do so might give the H-2B employer a cost advantage. If Hotel X can pay its foreign housekeepers $8 an hour with no fear of agitation or organizing, Hotel Y will have more reason to resist its U.S. employees’ demands for a raise.\textsuperscript{137}

**Results of Final Rule**

With the enforcement of the Final Rule in which employers are required to pay the highest of the federal, state, and prevailing minimum wage looming, the effects are variable. The DOL envisioned a scenario in which the higher wage would result in a regain of advantage to the American worker.

Thus, the Department believes that for years in which the number of applications exceeds the number of workers available under the cap, there will be no deadweight loss in the market for H-2B workers even
if some employers do not participate in the program as a result of the higher H–2B wages. Indeed, the higher wages expected to result from the Final Rule could in turn result in a more efficient distribution of H–2B visas to employers who can less easily attract available U.S. workers. The Department believes that those employers who can more easily attract U.S. workers will be dissuaded from attempting to participate in the H–2B program after the Final Rule goes into effect, so that those employers participating in the H–2B program after the rule is in place will be those that have a greater need for the program, on average, than those employers participating in the H–2B program before the Final Rule goes into effect.138

Additionally, industry employers complain that the application numbers are so quick to reach the cap, that they are unable to hire H–2B workers as planned. The timing rule of the applications hurts employers too. In 2008, for example, the cap was met on January 2, which made it impossible for employers who wanted to hire temporary workers during the summer, because they are not allowed to apply for H–2B visas more than 120 days before the workers begin to work.142

The sharp contrast offered by these two views provides an ironic picture -- there seems to be a shortage of workers in many industries, even with the high unemployment rate in the U.S.

It is notable that Paul Monte, general manager and CEO of Gurney’s Inn Resort, Spa and Conference Center, mentioned that due to the limited number of H–2B workers he managed to recruit, he had to hire J–1 visas and hospitality interns from foreign countries.143 This is an intriguing point because currently there are a lot of foreign student U.S.-internship programs, and these students could serve as “seasonal workers” to fill the gap which the restrictions of H–2B program create. However, if the employers adopt this method to transition during shortage period, merely restricting the H–2B visa program might not reduce the U.S. unemployment rate, because other visas, like J–1 and Q–1, would also pose a threat to U.S. workers.

Wages

The H–2B guest worker program is perceived as problematic by many, as the program undermines U.S. counterparts’ wages, which already appear unsatisfactory for American critics. According to a report by the EPI, the hourly compensation of U.S. workers with high school diplomas has stagnated from 2002 to 2007, while U.S. companies enjoyed higher productivities.144

Although USCIS regulations require that the employment of H–2B workers must not adversely affect the wages of similarly employed U.S. workers, the unequal social status between H–2B workers and U.S. workers still reduce the effectiveness of the regulation. The H–2B workers are very dependent on their employers because they are unable to change jobs. Once the employers fire these workers, they are faced with deportation and banishment. Thus, H–2B workers often feel reluctant to complain even though they are paid unequally. This inferior position, in
Furthermore, the U.S. Labor Department requires that the prevailing wages should be based on the highest of the following three measures: wages established under a collective bargaining agreement; a wage rate established under the Davis-Bacon Act or the Service Contract Act for the occupation in the area of intended employment; or the mean wage rate established by the Occupational Employment Statistics wage survey for that occupation in the area of intended employment. This rule provides the guideline to determining the final required wages paid to the H-2B workers after taking prevailing wages into account. If we define the prevailing wages as the mean wage rate established by the Occupational Employment Statistics (OES), we can use the online database provided by the OES to compare the wages derived from the minimum wage requirement. Table 1 shows the hourly mean wages defined by the OES. The occupations selected are commonly recognized as ones heavily utilizing H-2B non-immigrant workers.

Furthermore, the U.S. Labor Department requires that the prevailing wages should be based on the highest of the following three measures: wages established under a collective bargaining agreement; a wage rate established under the Davis-Bacon Act or the Service Contract Act for the occupation in the area of intended employment; or the mean wage rate established by the Occupational Employment Statistics wage survey for that occupation in the area of intended employment. This rule provides the guideline to determining the final required wages paid to the H-2B workers after taking prevailing wages into account. If we define the prevailing wages as the mean wage rate established by the Occupational Employment Statistics (OES), we can use the online database provided by the OES to compare the wages derived from the minimum wage requirement.

Table 1 shows the hourly mean wages defined by the OES. The occupations selected are commonly recognized as ones heavily utilizing H-2B non-immigrant workers.

This table shows that all occupations selected above have surpassed the highest minimum wage, which is that of the state of Washington. Thus, according to the final rule on the calculation of the wage for H-2B workers, H-2B workers should be paid at least the mean wage rate established by the OES, provided that the OES wage survey is accepted as the prevailing
The Center for Immigrant Studies (CIS), in researching the impact of H-2B workers on the U.S. job market, provides data on the number of H-2B visas issued early from 1987 until 2008. Indeed, this number has increased dramatically from one and two decades ago, with the peak of more than 120,000 issued in 2007 (including H-2R returning visas). However, if we take a look at the number issued with and without H-2R visa in only the most recent eight years from 2002-2009 (graphed below), we do see a mixed picture.

The number of H-2B visas issued (excluding H-2R) has been inconsistent during the years 2002-2009, with the highest issuance in 2008 and lowest issuance in 2009. Generally this does not indicate a significant change in H-2B visa issuance throughout these years. However, if H-2R visas are also included, we see a huge wage.

**Number of H-2B Visas Issued and the H-2R Visa Program**

bulge among 2005 to 2007. H-2R visas are designed for returning H-2B workers. The advantage of this visa is that the number of H-2R returning workers is not counted against the fiscal year’s annual limit of H-2B visas, which is 66,000. Suppose an H-2B worker, having finished one year of temporary work in the U.S., goes back to his or her home country and plans to return to the U.S. for work again; with an H-2R visa, he or she does not need to apply for a new H-2B visa to enter the US.

The H-2R provisions became part of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, which was signed into law by President Bush on May 11, 2005. This legislation was allowed to expire on September 30, 2007; the expiration drew large opposition from the employers. Indeed, this legislation has pushed the number of non-agricultural guest workers to the all-time high of more than 120,000 in both 2006 and 2007, with the number of H-2R issued higher than that of H-2B.

Undoubtedly, the expiration of H-2R visas was a blow to employers relying heavily on employing guest workers. They complained that they had invested time, training, and other fees in these workers, and some said they had developed friendships with the workers. However, since these workers were unable to return for work, the business suffered.

Conclusion

As the literature has revealed, the H-2B program has many complexities. These extend from program guidelines, the employer application process, the employer recruitment and verification process, the recruiting and intermediary bodies, and the conditions beholden to H-2B visa workers, to wage determinations. The literature also revealed that there are advocates both for and against the H-2B visa program, its impact on the American labor market, and future expansions or contractions of the program.

This literature provokes questions and further investigation into: the impact of intermediaries and their recruitment methods, an investigation of the effects H-2B workers on wages and unemployment for U.S. workers, and worker protection inadequacies within the program and its spill-over into the American economy. These questions will be investigated fully in this paper, and both policy and general recommendations will be made based upon such analysis. A description of the methodologies and limitations will be discussed in the following section.

Methodologies and Limitations

Approach

Our group’s methodology for conducting the research necessary for this paper consisted of reviewing multiple sources and conducting original analyses. In our initial research on H-2B visas, we first needed to determine specific questions in order to progress. What we found was a plethora of information that detailed: the employer and employee application processes for the H-2B visa, the problems that arise from this visa, and the effects that it has had on the American labor market and economy. The H-2B visa group utilized the library sources afforded by Cornell, LexisNexis, Factiva, et al. Furthermore, through the group’s bi-weekly meetings, we narrowed down the scope to emphasize the key questions, case, and policy analysis.

After our research questions were determined, credible sources were needed to support our understanding of the H-2B visa and enable us to write a well-sourced paper. For the purpose of objective analysis, the group chose to research materials from institutes that supported differing sides of the issue, looking at the research done by the Economic Policy Institute, Department of Labor, Chamber of Commerce, Center for Immigration Studies, Occupational Employment Statistics, U.S. Center for Immigration Studies, Government Accountability Office, and the Department of Homeland Security.

Methodologies

Each portion of the H-2B visa paper and literature review focused on the research questions that arose from the research review. The multiple questions that were posed in our initial research produced an efficient way of structuring this paper. Therefore, each section is characteristically unique in its structure and approach. Given the aforementioned sources of information, data was collected from policy papers, blogs, original research, case studies and legislation proposed to Congress. This design allowed us to investigate a wide range of material, focus, and opinions, and was crucial in helping us form a comprehensive perspective for the project.

The group’s analysis of the history of H-2B visas
examined its introduction into the work force, and detailed the reason for its existence. Recent legislative acts extending from the last five years to date were examined and selected on a related to H-2B basis. Defining the conditions for H-2B workers was essential. Through case studies conducted by the Southern Poverty Institute, DOL, EPI, and CIS that delved into the lives of workers in diverse industries, the group better understood the experiences of the average H-2B worker. Data was also gathered from cases in which fraud was prevalent and civil suits ensued.

Our research and analysis of intermediary bodies proved difficult due to the lack of information available. Nevertheless, the intermediaries' websites offered information and insight to the role they played in the process. To get a holistic view, we assessed the implications of going through an intermediary to find H-2B workers to fulfill a temporary employment need.

Of particular interest to our analysis was the research conducted on wages and effects on the economy. To determine whether or not the wages given to the workers were fair, the group conducted charting and comparative analysis. The data provided by the OES, EPI, and the U.S. Department of State, enabled us to construct the graphs necessary. With the results of the final rule stating that employers must now pay H-2B workers the highest of the prevailing wage, state minimum wage and the federal minimum wage, a rule set by the DOL, we were able to create a chart that compares the above-mentioned data to the final rule. The group was then able to determine if there are discrepancies between the prevailing wage and the actual wage paid to H-2B workers. Our research then led to an analysis of the unemployment rate and H-2B worker enrollment numbers pre and posts the U.S. economic crisis. Further, our research led to an economic comparison of the impact of the H-2B visa program on the supply and demand of workers within the U.S. during both an economic boom and an economic recession. For the purposes of simplicity during our analysis, we assume that a linear model adequately describes the U.S. labor market with the inclusion of H-2B workers. Similarly, our investigation presumes a certain amount of homogeneity of skill levels among H-2B and U.S. workers within any one industry. However, despite this assumption, it
is believed that H-2B workers may actually receive a higher competitive advantage in the labor market due to their willingness to work at lower wage rates or because of their unique specialty skill sets which are unmatched by their domestic counterparts.

The case study was developed further into the project after an appropriate amount of data was aggregated. Therefore, the group was able to concentrate on an issue that needed to be further elaborated on, subsequently constructing an outline of the case study and authoring recommendations based on an assessment of the Temporary Non-Agricultural Employment of H-2B Aliens in the United States: Notice of Proposed Rulemaking (NPRM) of March 18th, 2011.

**Limitations**

Raw data for some wages and the numerical demand for H-2B workers also eluded the group. The most recent data findings brought the comparison to 2008, which does not necessarily incorporate the full impact the financial crisis may have had on H-2B workers. Also, the data was primarily obtained from web resources. Although this does provide an up-to-date resource, it may not be considered the most reliable source of data.

Although the data obtained was enough to provide a thorough analysis, problems arose in insufficient data pertaining to the intermediary bodies. Some websites were not updated since their inception and/or did not reflect the regulations created by new legislation. Consequently, the information provided by the websites could be either antiquated or wrong.

Through looking at all of the resulting literature and research conducted into the conditions for H-2B visas, it is difficult to determine whether conditions are actually substantially worse for all of the H-2B workers or are magnified by showcasing workers with particularly negative experiences. Some resources point out that the majority of H-2B workers are not actually being abused by their employers, and that the H-2B visa holders have nothing but nice things to say about their employers when answering questions regarding them.\(^5\)

A common response bias may have transpired in collecting data, in the research we examined, as well as in our own review of the research. This occurs when data collected only comes from a specific source, which would be in this case a collection of disgruntled H-2B workers. However substantial this may be, it is cause for further investigation in the process and consequences of the H-2B worker.

**Final Steps**

We are confident that our findings provided us with a complete understanding of the H-2B visa. Given the data that was attainable, the group is confident that the policy analysis and recommendations will best reflect the necessary actions for the H-2B program, application, and recruitment processes. Furthermore, the data collected allowed the group to identify ideological perspectives common to supporters and critics of the H-2B visa program and its associated impact on the economy.

For parts of the qualitative analysis, we focused on court cases that were indicative of fraud and deception within the system. These cases were summarized and compiled into a chart that explains what infractions occurred, either wage abuse, excessive fees, fraudulent documentation, and/or general abuse.
Analysis

The final rule on the calculation of the wages of H-2B workers released by the Department of Labor (DOL) makes it clear that H-2B workers should be paid at least the prevailing wage, as defined by the Occupational Employment Statistics (OES). In our Literature Review, we compared the prevailing wage to the federal and state minimum wages, and drew the conclusion that the prevailing wage as defined by the OES should be the guideline for the employers and government agencies. Naturally, the next step is to identify and examine whether the existing wages paid to H-2B workers are higher, lower, or equal to the OES prevailing wages.

To determine the existing wages of H-2B workers, we accessed the Foreign Labor Certification (FLC) Data Center Online Wage Library, which we believe is the most accurate and objective of the online databases.\(^{357}\) This database includes employer-specific case information ranging from employers’ names, locations, and industry to the rate of pay for the H-2B workers. The information was provided by the employers who submitted foreign labor certification applications to the Employment & Training Administration (ETA). “The data available for the H-2B Temporary Non-Agricultural Labor Certification Program is only for applications that have been received and entered into the Department of Labor (DOL) tracking system.”\(^{158}\) One limitation of utilizing this data is that some employers did not report their rate of pay of H-2B employees along with other missing information.

For example, the 2010 H-2B wage data available on the FLC provides the wages of H-2B workers with different occupations in different states. In order to make a more accurate comparison between the prevailing wage and the wages paid to H-2B workers, it is necessary to take different states into account. For instance, we can compare the prevailing wage of amusement park workers in the state of Washington with the wage paid to H-2B workers employed in the same occupation within the same state. This comparison is more accurate because different states have different wage criteria, and states with higher minimum wages tend to have higher prevailing wages.

**H-2B Workers Concentration by State and Countries of Origin**

Since the H-2B workers are highly concentrated in some states, and the workers’ countries of origin vary, an examination of the H-2B workers’ countries of origin and destinations within the U.S. is necessary before we can compare their occupational wages with those of U.S. workers. The rationale behind this is that comparing wages in highly concentrated states should be more representative because there are more samples in these states. U.S. Department of Homeland Security provides information on both of these categories. The below chart shows the top 20 H-2B workers’ destination states as well as the top 20 countries from which the U.S. offers H-2B workers’ admission. This data is collected from the 2009 fiscal year, the most recently available data from the Department of Homeland Security (DHS).

As the table shows, Mexico has highest number of H-2B workers admitted to work temporarily in the U.S. Its number of admission of 37,325 is approximately 11 times that of Jamaica, which ranks number two among countries of origin. Of 56,381 H-2B visa workers admitted by DHS, the top 20 countries accounted for 95.2 percent, and Mexico accounted for 66.2 percent of the total H-2B population. The right side of the table indicates that Texas has the largest number of H-2B workers admitted by DHS, followed by the state of Florida, Louisiana, Virginia, Colorado and California, each of which have over 2,000 H-2B workers. Of 56,381 H-2B visa workers admitted by DHS, H-2B workers of the top 20 states occupied 80.6 percent of all H-2B workers, and Texas State accounted for 18.6 percent of the total H-2B population in the U.S. The table of number of H-2B workers admitted by state provides us some insight into the states that are important for us to examine and conduct wage comparisons.

**Wage Comparison and Gap Analysis**

To conduct a wage comparison, we have chosen to focus on the top six states that admitted H-2B worker populations greater than 2,000 persons in year 2009. There are altogether 4,535 cases available on
Of 538 sample cases in Texas, 292 were fully certified, 180 were partially certified, and 66 denied. The available wage data originated only from those employers who were successful in their application to recruit H-2B workers. Amusement park workers with H-2B visas are, on average, paid $7.42 per hour by their employer. This amount is significantly lower than the Occupational Employment Statistics (OES) average worker wage of $8.90 per hour for an individual in the state of Texas employed in a similar occupation, a total difference of $1.48 per hour. For entry-level H-2B construction workers, Texas employers pay $8.63 per hour. However, the OES
shows that construction laborers are paid an average of $11.36 per hour, a difference of $2.73 per hour. This difference of $2.73 per hour is a very conservative estimate as construction laborers are listed as one of the lowest paid subgroups among other construction and extraction occupations in the OES data.\textsuperscript{160}

According to the OES, the landscaping laborers should be paid $10.56 per hour. However, the FLC data shows that H-2B landscape laborers only receive $8.21 per hour, a difference of $2.35 per hour. H-2B industrial and commercial groundskeepers are paid an average of $8.03 per hour, while the OES data shows a wage of $11.05 in Texas for an American occupying a similar position, a difference of $2.53 per hour. In addition, H-2B fence erectors are paid $8.58 per hour on average, while the OES shows that the average prevailing wage for the same occupation is $12.11, a difference of $3.53 per hour. H-2B roofers are paid $8.77 per hour according to the FLC data, while roofers in the state of Texas are paid $14.46 on average, a difference of $5.69 per hour.

\textbf{Florida}

Of 313 sample cases in Florida, 161 were fully certified, 85 partially certified, and 67 denied. We have compared wages in the occupations of amusement park worker, animal caretaker, housekeeping cleaner, cook, dining room attendant, and landscape laborer. H-2B employers report an average wage of $8.41 per hour for dining room attendants, while the OES data reports an average prevailing wage of $8.81 per hour, a difference of $0.40 per hour. H-2B cooks are paid an average of $10.97 per hour, while the OES data reports a mean wage of $10.36 per hour, which means that American workers are being paid $0.61 per hour less than their H-2B equivalents. The standard error of the sample data is $0.057, indicating that the difference of $0.61 is big enough to be statistically significant. For H-2B amusement park workers, employers in Florida pay them an average of $7.76 per hour, while the OES data shows that the US prevailing wage for amusement park workers is $9.27 per hour,\textsuperscript{161} a difference of $1.51 per hour. For a housekeeping cleaner position, H-2B employers report an average wage of $7.73 per hour, while the OES data shows an average wage of $9.39 per hour in Florida, a difference of $1.66 per hour. H-2B roofers working as animal caretakers are paid an average of $8.31 per hour; however, the average prevailing wage in Florida for the similar position is $10.79 per hour according to the OES, a difference of $2.48 per hour. For landscape laborers, H-2B workers are paid an average wage of $8.61 per hour; however, the OES data reports an average hourly wage of $11.21, a difference of $2.60 per hour.

\textbf{Louisiana}

Using the same logic for the state of Louisiana, five occupations were chosen to compare H-2B worker

\begin{figure}[h]
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\includegraphics[width=\textwidth]{figure3.png}
\caption{Differences in wages between H-2B workers and Occupational OES prevailing wages in Texas}
\end{figure}
H-2B landscape labors are paid an average of $7.62 per hour, while the OES data reports a mean wage of $10.65 per hour, which means that American workers are being paid $3.03 per hour more than their H-2B equivalents. For a groundskeeper position, H-2B employers report an average wage of $7.37 per hour, while the OES data shows an average wage of $10.65 per hour in Louisiana, a difference of $3.28 per hour. For H-2B entry-level construction workers, employers in Louisiana pay them an average of $8.44 per hour, while the OES data shows that the US prevailing wage for construction workers is $12.71 per hour, a difference of $4.27 per hour. H-2B crab meat processors are paid an average of $9.55 per hour; however, the average prevailing wage in Louisiana for the similar position is $8.13 per hour according to the OES. It is worth noting that H-2B crab meat processors are paid $1.42 per hour more than the prevailing wage, and that this difference is statistically significant at the 5 percent level with a standard error of only $0.05. For production helper, H-2B workers are paid an average wage of $9.07 per hour; however, the OES data reports an average hourly wage of $12.04, a difference of $2.97 per hour.
The following occupations were chosen to conduct a wage comparison in Colorado: housekeeping cleaner, groundskeeper, housekeeper, and landscape laborer. For H-2B housekeeping cleaners, employers in Colorado pay them an average of $9.69 per hour, while the OES data shows that the US prevailing wage for housekeeping cleaners is $10.06 per hour, a difference of $0.37 per hour. For a housekeeper position, H-2B employers report an average wage of $9.47 per hour, while the OES data shows an average wage of $10.06 per hour in Virginia, a difference of $0.59 per hour. H-2B landscape labors are paid an average of $9.34 per hour, while the OES data reports a mean wage of $12.83 per hour, which means that American workers are being paid $3.49 per hour more than their H-2B equivalents. H-2B workers working as groundskeepers are paid an average of $9.27 per hour; however, the average prevailing wage in Virginia for the similar position is $12.83 per hour according to the OES, a difference of $3.56 per hour. Our findings are shown in the following graph.

**Virginia**

The following occupations were chosen to conduct a wage comparison in Virginia: crab meat processor, groundskeeper, landscaping laborer, lifeguard, and production helper. H-2B lifeguards are paid an average of $8.33 per hour, while the OES data reports an average wage of $8.91 per hour, which means that American workers are being paid $0.58 per hour more than their H-2B equivalents. For H-2B crab meat processors, employers in Virginia pay them an average of $7.57 per hour, while the OES data shows that the US prevailing wage for crab meat processors is $9.47 per hour, a difference of $1.90 per hour. H-2B workers working as groundskeepers are paid an average of $8.64 per hour; however, the average prevailing wage in Virginia for the similar position is $11.42 per hour according to the OES, a difference of $2.78 per hour. For production helper, H-2B workers are paid an average wage of $7.78 per hour; however, the OES data reports an average hourly wage of $10.79, a difference of $3.01 per hour. For a landscape labor position, H-2B employers report an average wage of $8.37 per hour, while the OES data shows an average wage of $11.42 per hour in Virginia, a difference of $3.05 per hour. Our findings are shown in the following graph.

**Colorado**

For the state of California, we chose the following occupations to conduct a wage comparison: amusement park worker, animal caretaker, recreation facility attendant, and stable attendant. For a recreation facility attendant position, H-2B employers report an average wage of $8.66 per hour, while the OES data reports a mean wage of $9.34 per hour, a difference of $4.27 per hour. Our findings are shown in the following graph.

**California**

For the state of California, we chose the following occupations to conduct a wage comparison: amusement park worker, animal caretaker, recreation facility attendant, and stable attendant. For a recreation facility attendant position, H-2B employers report an average wage of $8.66 per hour, while the OES data reports a mean wage of $9.34 per hour, a difference of $4.27 per hour. Our findings are shown in the following graph.

Figure 6. Differences in wages between H-2B workers and OES prevailing wages in Virginia
Our gap analysis shows that most wages paid to H-2B workers are lower than the prevailing wage for the occupation as defined by the OES. The differences in our samples range from $0.37 to $5.69 per hour, with most of the differences being statistically significant. This implies that most employers hiring H-2B workers, at least in these samples, do not comply with the newly released Final Rule. To comply with this rule, employers should raise H-2B workers wages in connection with the prevailing wages determined by the OES. Evidence to support this recommendation can be easily provided by the low wages that employers pay them. For example, in California, pay them an average of $8.65 per hour, while the OES data shows that the U.S. prevailing wage for amusement park workers is $9.92 per hour, a difference of $1.27 per hour. H-2B stable attendants are paid an average of $9.56 per hour, while the OES data reports a mean wage of $11.43 per hour, which means that American workers are being paid $1.87 more per hour than their H-2B equivalents. H-2B workers working as animal caretakers are paid an average of $9.51 per hour; however, the average prevailing wage in Virginia for the similar position is $11.43 per hour according to the OES, a difference of $1.92 per hour. Our findings are shown in the following graph.

**Implications**

Our gap analysis shows that most wages paid to H-2B workers are lower than the prevailing wage for the occupation as defined by the OES. The differences in our samples range from $0.37 to $5.69 per hour, with most of the differences being statistically significant. This implies that most employers hiring H-2B workers, at least in these samples, do not comply with the newly released Final Rule. To comply with this rule, employers should raise H-2B workers wages in connection with the prevailing wages determined by the OES. Evidence to support this recommendation can be easily provided by the low wages that employers pay them.
are seen to pay their H-2B workers in the six states we examined. In general, the low wages we found within these states serves as an indication that most other states in the U.S. may likely underpay similarly employed H-2B workers.

Having conducted the gap analysis, we can see that nearly all of the H-2B worker occupations examined are under-paid based on the Final Rule. Exceptions are H-2B workers employed in the occupation of cooks in Florida and crab meat processors in Louisiana. Further, the wage surplus of cooks in Florida and crab meat processor in Louisiana is statistically significant, because their standard errors are big enough to reject both null hypotheses at the 5 percent level of significance. However, these two occupations are rare cases, since all other comparisons revealed that H-2B workers were underpaid relative to American workers.

### H-2B Workers and Economics

Let us examine several possible ways in which the H-2B program could affect the American economy and American workers. We will be assuming a classical economics analysis. First, let us consider the case of an absence of the H-2B visa program. If there were no H-2B program and employers could only seek laborers domestically, the labor shortage issue would be resolved through a necessary wage increase. This is because in autarky with a fixed labor supply, employers can only incentivize workers to change professions by offering higher and more competitive wages. Otherwise, the employer would be unable to successfully hire workers and would have to reduce business activities or exit the market. For example, the graph below shows the supply and demand curve for a certain profession. Suppose the demand for laborers increases from $D_1$ to $D_2$, so that employers need to hire more workers. Since the workers’ supply is unchanged, the equilibrium level of employment increases from $L_1$ to $L_2$, and the equilibrium wage increases from $W_1$ to $W_2$. At the new equilibrium level, employers have to offer a difference of $W_1$ and $W_2$ more to attract additional workers. The original wage of $W_1$ is no longer enough to meet additional workers’ need.

**Figure 9 (see right):**

*Supply and Demand of Labor in Autarky* In autarky, a shift in the demand curve needs to happen in order to entice more people by increasing the wage from $W_1$ to $W_2$.

Generally, people become increasingly interested in a new position if they think they can benefit more from it. Offering greater benefits will attract potential employees who are willing to enter the job market and undergo training for a new position if it is in their interest. For example, suppose a construction employer who wants to hire workers is unable to find ones locally. He may not be able to find them because people in the job market are satisfied with their current employment and unwilling to work in construction sites due to the low pay the employers offer. After all, quitting an existing job will create many costs for an individual. These begin with complex resignation procedures, to the loss of the existing relationships with colleagues, to the overall riskiness of taking a new job. However, there is always a break-even point for an individual to make this decision. If the salary for the construction work is raised to the point that all his or her cost of switching job can be covered or minimized, or so that the new wage offered is competitive, he/she will probably pursue the opportunity since switching jobs will make him/her better off.

Another scenario pertains to members of the workforce who are unemployed, but still would not want to become construction workers. People are reluctant to work as construction workers for many reasons: risks of injury, lower social status, the strenuous nature of the work, etc. Similarly, even for these workers there is a break-even point where they would willingly become employed as construction workers if they believe the benefits received by...
working on a construction site outweigh their other concerns. That is, if the employer who was unable to find workers decided to raise the salary/benefits to attract candidates, people would have more incentives to pursue employment as a construction worker.

The “shortage” claimed by the employers is not actually a real shortage as there are U.S. workers who would willingly pursue a career in construction, food services, or housekeeping. Instead, employers subconsciously add a condition that results in a shortage, i.e. claims that the salary of a worker in these positions can only be offered at a fixed low wage. Therefore, it makes sense that employers perceive a labor shortage in a specific occupation when the job is perpetually underpaid. As the demand and supply graph shows, when the real demand of labors changes from \( D_1 \) to \( D_2 \), while the employers still pay original wage of \( W_1 \), the person-hours remain at \( L_1 \), and no additional workers will work at the construction site. However, as the wage increases, people will change their life situations to pursue a more competitive option, and the perceived shortage will gradually disappear.

**Figure 10 (see below):** Supply and Demand of Labor in Autarky

When the demand shifts from \( D_1 \) to \( D_2 \), an new equilibrium is achieved from \( W_1 \) to \( W_2 \) with a result of an increase to \( L_2 \) in employment. Otherwise, a shortage occurs at the original wage of \( W_1 \).

Therefore, the real shortage will not exist in the sense that when facing enough benefit to cover the cost, people will fill the gap. Of course, this cost varies among people so that the gap will always be filled first by those who encounter fewer costs than others. This is why we have a huge supply of H-2B workers, who usually live in less developed counties with lower wages. Coming to work in the U.S. means a higher rate of pay, and while it is lower than the U.S. prevailing wage, it is higher than their wages back home. This asymmetric standard of living enables the H-2B employers to take advantage of the foreign workers, and deprive the U.S. workers of occupations and wages that they deserve.

From an economics perspective, the introduction of H-2B workers will certainly affect the U.S. job market. Without a foreign workers program, domestic demand and supply of labor would determine the equilibrium wage that the U.S. workers would be paid. In situations where the U.S. economy booms, the demand from U.S. employers will increase (\( D_1 \) to \( D_2 \)), increasing the wage of the fixed supply of U.S. workers (\( W_1 \) to \( W_2 \)). However, when the U.S. economy is in recession, the demand from the employers will decrease (\( D_1 \) to \( D_3 \)), so that the wage should also decrease given a fixed amount of worker supply on the graph (\( W_1 \) to \( W_3 \)). But contrary to this logic, wage reduction by employers is uncommon in reality because of union involvement, concern of harming workers’ morale, and so forth. Instead, workers are more likely to be given less hours to work or faced with being laid-off in a recession than the possibility of a wage cut. As the right graph shows, the wage level would still stick to \( W_1 \), but employers only demand for \( L' \) person-hours at \( W_1 \). This is to say, the employers will lay off even more workers due to the wage floor.
**Figure 11. Demand of Labor Shift in Autarky**

In a closed boom economy (left), employers tend to hire more U.S. workers. Thus, demand shifts from $D_1$ to $D_2$, causing the wage to rise. In a closed recession economy (right), employers tend to hire fewer U.S. workers. Thus, demand shifts from $D_1$ to $D_2$. The equilibrium wage should be $W_3$. However, due to the sticky wages, employers still have to pay U.S. workers an initial wage of $W_1$. As a result, employers would only like to provide $L'$ person-hours. That is, employers will have to lay off more workers than the case that the employment reaches the equilibrium.

However, the introduction of H-2B workers essentially increases the supply of labor ($S_1$ to $S_2$), resulting in more workers at each level of wages, and restraining the increase of wages to the domestic equilibrium level. In this case, the wage increase in a boom economy will be less apparent than in the case of autarky ($W_1$ to $W_4$). The exact position of the wage depends on the magnitude of the shift of the supply curve.

**Figure 12. Supply and Demand of Labor Shifts in Open Economy**

In an open boom economy, employers tend to hire more workers. Thus, demand shifts from $D_1$ to $D_2$. With the influx of H-2B workers, supply also shifts from $S_1$ to $S_2$, making the equilibrium wage level at $W_4$, dependant on the relative magnitude of increases of supply and demand, and $W_4$ is less than $W_3$. In an open recession economy, employers tend to hire fewer workers, making demand shift from $D_1$ to $D_2$. The influx of H-2B workers increases the supply of labor by shifting $S_1$ to $S_2$. The shifts of demand and supply drag the wage even lower than the case of autarky. Furthermore, the sticky wages will not happen since employers have the alternative to hire H-2B workers instead. Graphically, workers can only receive a wage of $W_5$ as long as it is bigger than the minimum wage, and $W_5$ is less than $W_3$. 
When the economy is in recession, the introduction of H-2B workers will make a difficult job market even worse. In the case of an economic boom, the introduction of H-2B workers essentially shifts the U.S. domestic supply curve upward meaning there are more people competing for a given wage. In the case of an economic depression, the downturn forces the employers to cut costs. Employers have to shut down factories and demand less labor. Thus, the increase in the supply of labor together with the decrease in employers’ demand will cause the wage equilibrium level to fall even further than in the closed-system case in which only U.S. workers were seeking jobs (W_1 to W_2). It is notable that the sticky price situation described in the closed recessionary economy scenario could not happen this time as long as W_1 is bigger than the minimum wage, because employers will probably not be concerned with the wage cut, which would result in weak morale and union strike in autarky. With the influx of H-2B workers, employers could simply fire more U.S. workers, and instead hire H-2B workers, who would accept lower wages without hesitation. Indeed, in this situation U.S. workers are very likely to be the first on the lay-off, because as our wage comparison shows, U.S. workers are generally paid more than H-2B workers and thus their removal will result in the greatest cost savings for the employer. Employers will also have the incentive to keep H-2B workers because these workers are seen to work harder in order to avoid deportation and being fired.

This is not to say that H-2B workers do not provide a vital service to certain U.S. employers. Indeed, the introduction of H-2B workers will help enhance the specialization of labor in some occupations. Although there are enough U.S. workers to fill most of the petitioned for occupations, it is not true that U.S. workers have a competitive advantage in all occupations. Letting H-2B temporary workers fill the occupations that U.S. workers are relatively not good at would achieve higher productivity at a lower expense. This will in turn increase job opportunities that U.S. workers are better competent. For example, let us examine the occupation of a cook. A U.S. cook may be unable to prepare authentic Brazilian cuisine of the same quality or speed as a Brazilian cook who was born and raised in Brazil and trained in their culinary styles. It might take an American cook a long time to learn how to cook authentic Brazilian food, and to be skilled at it. In this case, hiring a Brazilian cook will prove cost effective for the employer and bring to the table the true specialty position that an H-2B worker ought to fulfill. Hiring a Brazilian cook over a U.S. cook would enable the employer to have better cuisine, improve business, enable kitchen management to be more efficient, thus serving more customers, which in turn boost a restaurant’s revenue to hire more employees by expanding its business.

The H-2B Cap

Currently, the H-2B cap set by Congress is 66,000 per fiscal year, with 33,000 to be allocated in the first half of the fiscal year and the other 33,000 allocated in the second half of the fiscal year. Although the cap is set to limit the maximum number of foreign workers entering the U.S., it is an arbitrary number at best. No evidence has been found validating that the cap of 66,000 is set based on the real need of temporary workers by U.S. employers. Increasing or decreasing the cap by, for example, 10,000 is likely to impact the U.S. job market significantly, though we are not sure the magnitude of the impact and even whether it is positive or negative. A 10,000 increase in cap could meet more needs of the employers who are in real need of temporary workers, and thus, ensure that their businesses are working under full capacity, which in turn would help boost the U.S. economy. On the other hand, a 10,000 decrease in cap would directly provide more job opportunities for U.S. workers, no matter whether they are willing to work or not.

The fixed cap of 66,000 every year does not make economic sense, nor does it reflect the needs of the U.S. labor market. Obviously, Congress’ steady yearly cap overlooks the changing economic conditions of the U.S. The cap reached when the unemployment rate is 8 percent should be significantly different from the cap reached when the unemployment rate is 18 percent. When the economy is in recession, as witnessed in the U.S. in 2008 and 2009, employers will cut every corner to reduce their costs. Recruitment strategy is included in their cost-reducing arsenal. They would lay off higher wage workers and hire those who can be paid at a lower rate, a situation made easier by the introduction of H-2B workers. Also, as we have found during our study of the program, many papers state that H-2B workers are seen to work more and complain less due to their dependence on employers to maintain their immigrant status within the country. As a result, when the recession comes, U.S. workers may have a higher chance to be laid off, and the demand for H-2B workers may remain constant or even increase.
However, if the cap was set at a lower amount, then when an economic recession were to hit, employers would not be able to substitute cheaper foreign labor for American workers, thus limiting their ability to take advantage of this loophole.

**Cases of Fraud and Abuse**

This qualitative analysis section of our paper examines instances of H-2B fraud and abuse, and makes deductions from the findings to help establish recommendations for the H-2B program. In the cases reviewed below, there were instances of: a) wage abuse, in which H-2B employees were paid less than the prevailing wage and/or did not pay overtime; b) excessive fees being withdrawn from H-2B employees’ paychecks; c) fraudulent documentation being sent to government officials; and d) general abuse, taking into account the conditions of the workplace, threats by the employer, and employee documentation being withheld. The information gathered in the table below reflects data from a Government Accountability Office (GAO) report, a report by the Southern Poverty Law Center, and a report by the Center for Immigration Studies. Many of these cases were argued under the Fair Labor Standards Act (FLSA), which protects H-2B workers from minimum wage abuse, overtime pay abuse, and fraudulent recordkeeping.166
<table>
<thead>
<tr>
<th>Employer/Location</th>
<th>Case Description</th>
<th>Wage Abuse</th>
<th>Excessive Fees</th>
<th>Fraudulent Documentation</th>
<th>General Abuse</th>
</tr>
</thead>
<tbody>
<tr>
<td>Signal Corporation, AL</td>
<td>Worked with a recruiter that charged employees their life savings for job placement in the U.S. Employees were subject to abuse by their employer.</td>
<td></td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Eller and Sons Trees, GA</td>
<td>H-2B workers allege that they were paid less than the minimum wage and not paid overtime wages.</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Alpha Services, MS</td>
<td>H-2B workers settled a lawsuit with the employer because they were not being paid the prevailing wage and overtime.</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Shores and Ruark Seafood, VA</td>
<td>Fined twice by the DOL for not paying H-2B workers the minimum wage.</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Brickman Group, MD</td>
<td>In 2008, the employer had to pay back wages to more than 100 employees for deducting excessive fees from their wages for visa, broker, and transportation.</td>
<td></td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Carnival Operator, NY</td>
<td>Did not pay the promised salary to H-2B employees, provided substandard housing, did not provide safety equipment, and verbally harassed employees.</td>
<td>X</td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Employer/Location</td>
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</tr>
<tr>
<td>Hotel, SD</td>
<td>Significantly underpaid their H-2B employees, did not pay overtime wages, charged excessive fees for housing and processing fees.</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Landscaping Company, VA</td>
<td>Filed by a labor union, this company allegedly hired H-2B employees preferentially over U.S. employees, in violation of federal law.</td>
<td></td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Forestry Company, AR</td>
<td>The company did not pay prevailing wages or overtime, forced employees to work 7 days a week with no overtime and no breaks, and unlawfully deducted fees from workers’ wages.</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Construction Company, LA</td>
<td>Submitted fraudulent documentation to federal officials/agencies, charged employees for H-2B visas and then never employed them in the U.S.</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hospitality Employer, Immigration Attorney, and Labor Broker, VA</td>
<td>Fraudulently obtained H-2B visa certification from the DOL for over 3,800 employees, obtained more visas than they needed and then selling those visas to other employers not listed on the petitions, and charged the employees excessive fees for rent.</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Hospitality Labor Broker, FL</td>
<td>Fraudulently obtained H-2B visa certification from the DOL, paid employees less than agreed upon initially, charged excessive fees for crowded apartments, and unlawfully deducted fees from employees’ paychecks.</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Landscaping Company and Labor Broker, PA</td>
<td>Requested more H-2B employees than they needed so that they could sell them to other employers illegally, misclassified employee job duties on applications in order to pay the employee lower wages, excessively charged employees for rent in substandard housing.</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Landscaping Company, CO, CT, DE, IN, MD, MA, MN, MS, NY, OH, PA, TX, VA, WI</td>
<td>The employer made excessive deductions from H-2B employees’ paychecks, which often resulted in the employee being paid less than the minimum wage.</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Results

Out of the 15 cases reviewed above, nine cases had allegations of wage abuse in which the prevailing wage or minimum wage was not paid, and/or overtime wages were not paid. In seven of the 15 cases, excessive fees were withdrawn from the H-2B employees’ paychecks. These charges included rent in substandard and overcrowded apartments, transportation charges, and visa processing fees. In six out of the 15 cases reviewed, the employers and/or labor brokers submitted fraudulent documentation to the DOL, the SWA, and USCIS. Finally, in seven out of the 15 cases we examined, general abuse was committed against the employee, including threats, substandard housing, promises of jobs in the U.S. (even though those promises were never fulfilled), and exorbitant charges by labor brokers to find jobs for the employees in the U.S.

According to the Southern Poverty Law Center, a common abuse reported by H-2B employees is that employers withhold their passports and social security cards. This is often done because the employer wants to ensure that the H-2B employees do not leave mid-contract. However, this puts the employee in a difficult situation as they cannot prove their documented status if asked. In other cases, some employers will explicitly threaten their H-2B workers by threatening to call the U.S. Immigration and Customs Enforcement agency. Further still, some H-2B employers misclassify the type of jobs that employees will be performing so that they can pay those employees a lower prevailing wage.

Additional types of fraud include “overlapping petitions” – this occurs when H-2B employers make multiple petitions throughout a given year to secure H-2B workers for each season, rather than the stipulated temporary work. These employers often apply under different company names. There is also “job description fraud” in which some H-2B employers petition for temporary foreign labor under jobs that pay a low prevailing wage, and when the employees arrive they actually perform jobs that would have required a higher wage. Another type of fraud is called “free time” because this occurs when an H-2B employer brings on H-2B workers for the full 10 months when they are actually not needed for that amount of time. The employee, when not needed, is given “free time” in which he/she can pick up undocumented work. Lastly, there is a type of fraud called “stacking the decks” – this particular
Case Study

On March 18th 2011, the Department of Labor (DOL), through the Wage and Hour Division (WHD) and Employment and Training Administration (ETA) agencies, introduced a notice for proposed rulemaking (NPRM) in regards to the Temporary Non-Agricultural Employment of H-2B Aliens in the United States. The proposed rule revamped the previous model that was used by employers applying for the H-2B visa and introduced compartmental changes in the application process designed to allow employers and the DOL to catch specific instances of fraudulent information earlier in the process. The DOL advocates amending the regulations governing the certification of employment for H-2B workers, which will in turn enhance protection for U.S. and temporary workers in the H-2B program. It is important to note that within the NPRM no changes are proposed regarding prevailing wages as they are now determined under the new Final Wage Rule.

Background

Prior to the NPRM, employers were required to first apply for a temporary labor certification from the Secretary of Labor. The attestation model simply allowed employers to attest that they had a need within their company for H-2B workers and that no U.S. workers were capable of performing such need. Furthermore, the employer was required to attest that the addition of H-2B workers would neither adversely affect the wages nor work conditions for the similarly employed U.S. workers. Additionally, the employer had to demonstrate that the need for the H-2B workers conformed to the definition of temporary service under the regulatory standpoint, that is, it would be a one-time occurrence, a seasonal need, a peak-load need, or an intermittent need. The regulatory power of the DOL was defined as minimal since the true goal was to supply the employer with the temporary service, while the other agencies, including the WHD and ETA, aided the process of granting the application for recruitment.

On May 22, 2008, the DOL proposed additional rules and regulations to fix the attestation based filing model. The DOL proposed that the State Workforce Agency, which oversaw the recruitment of H-2B workers, would no longer oversee this process. Alternatively, employers were freely able to conduct recruitment without the oversight of the federal or state legislatures. With this 2008 model in place, key issues were no longer reviewed by the DOL. Compliance before recruitment was initiated was instead postponed until employers were certified and granted recruitment opportunities. Although the roles proposed in the rules are not entirely explained, one could attribute the loss in funding and oversight by Congress to the recessionary economic climate of 2008. Furthermore, losses in capital incentivized the relinquishing of the DOL’s role in recruitment and instead attaching this responsibility to the employer. In other words, with such a decrease in funding, there was an incentive to pass the responsibility of managing the recruitment process onto the employer.

Indeed, the current attestation process leaves many gaps in the system and does not adequately protect the American workers. Under this model, before filing an application for H-2B workers, employers must first search within the American workforce and offer employment to those equally matched with the qualifications employers sought. A comprehensive restructuring of the process through which employers can justify their need for H-2B workers needs to be developed. Any change should deter employers in searching for H-2B workers before they consider the equally hirable American worker. It is evident that a better system needs to be instituted to protect workers.

Investigative Measures

From 2008-2010, the Department of Labor’s Wage and Hour Division led an investigation as to whether or not the attestation process in place worked. Inevitably, after the conclusion of their results, the DOL found that the attestation process lacked the necessary drivers to promote a healthy system that could entail honesty in reporting a supply shortage of American workers and attesting for the need of an H-2B worker. The division claimed that in the first year of operation of the attestation process, employers were fraudulently attesting to compliance with regulatory obligations in fact not in compliance with those obligations. These obligations included: a search for an unemployed American to fill the job; a temporary need of employment; full wages guaranteed to the H-2B worker; and finally, not
adversely affecting the wages and working conditions of the American worker. In subsequent rounds of audits, similar results were found which has led to a desired change in the model (please see below).

In accordance with the procedural audits conducted, several infringements were found by the DOL beyond the fraudulent claims of compliance attested by the employer. In the report, the DOL found that for both American and H-2B workers alike violations included: being offered less than full-time work even after advertisements by the employers stated that the work would be full-time; misrepresentation of the numbers of hours per week needed for the work; workers receiving pay less than the prevailing wage; and U.S. workers being rejected for other than lawful, job-related reasons such as not having a commercial driver’s license when one is not required to perform the job. These infractions were not restricted geographically. Nor were they industry-specific; they appear, in fact, to be endemic in the U.S., which purports a serious flaw within the system.

Analysis and Explanation of Select Proposed Rules

A new and comprehensive compliance-based system has been proposed to replace the current attestation model. Much like the change of the system that occurred in 2009 with the H-2A visa, under the compliance-based system, the employer would be required to submit the necessary documents to prove that their business has a need for the H-2B workers. In this format, employers would be able to fix any compliance-based problems they have before they are granted workers and can therefore avoid the fines associated with misrepresentation before they happen. The newly proposed rule pushes compliance issues and documentation to the forefront of the process and is meant to address both before employers are granted approval of their application. The new system will replace the de facto attestation system which requires compliance documentation only after the employer has been granted rights to recruit the workers. Therefore, the new model seeks to prevent fraudulent claims before they are committed, whereas the old system punishes the employer through fines and disbarment after the fact. This change does aid in preventing fraud in the system; however, it does not prevent the H-2B workers from being mistreated during their temporary employment. By the testimony of the DOL, this will identify potential problematic applications early on in the process. Furthermore, the new model applies the necessary level of transparency into the system through early documentation.

Another important feature included in this notice of proposed rulemaking is the exclusion of job contractors from being considered for application into the H-2B program. These companies, broadly described in our literature as “temporary agencies” or “job-shops”, contract H-2B workers and subsequently assign them to other business owners. These job contractors are a corrupt form of intermediaries. Whereas as a permitted and licensed intermediary link employers whom have registered through the system with the DOL to H-2B workers, these contractors house H-2B workers in their company and lease them out as they see fit. Their model, which relies on their being admitted H-2B workers, is in effect a faux temp agency. These entities, which are only engaged through the hiring process of the workers, invoke images of dubious proceedings in relation to their role with the H-2B system. In fact, their business plan and need for the H-2B worker to execute their plan is not temporary. Therefore their role is negligible according to the standards for applying for an H-2B visa. The disbarment of the intermediary role is proposed by the DOL for the following reason:

“It is the Department’s view that a job contractor’s ongoing need is by its very nature permanent rather than temporary and therefore the job contractor does not qualify to participate in the program. The contractor may have many clients, each of whom has a temporary need, but the contractor’s need for the employees it seeks to fulfill its contracts is ongoing and therefore of a potentially permanent duration. Accordingly, the contractor’s need would not be temporary.”

This suggestion appears to remedy one of the problems posed through our research into the system. The role of the intermediary has provoked much cause for speculation as they have no outright need for workers and instead utilize this loophole for profit. Abolition of this needless industry could potentially be in accordance with an improvement in the process.

In order to take into account the unique geographical conditions for some of the industries, the proposed rule seeks to introduce an online component to be registered with the State Workforce Agency (SWA). Given that these agencies possess a specialized ability
to examine and test the local market for potential need, compartmentalizing and delegating the application process to them may increase efficiency in the process. The DOL would reinstate the crucial role given to the SWA in assisting the employers given their specialization within regional markets. This would also expand the job opportunities for U.S. workers.

Additionally, through keeping an online database active in the system in which employers must submit an application for the worker between 120 and 150 days before the start of employment, the system would lend itself to the unemployed American workers who are seeking temporary employment. The effects of such a database are more descriptively approached within the recommendation section of our report. This, according to the DOL, will provide that the submission for the job is granted a maximum amount of time in visibility to the public allowing for more perusal by the unemployed U.S. workers within that region.

The new proposed rule issued in the Federal Register by the Department of Labor may not correct all of the underlying problems that have plagued the H-2B system, but is a step in the right direction in regards to eliminating fraud and perhaps decreasing the view of the American worker that jobs are unfairly being given to H-2B workers. Many issues are addressed within the framework of these new rules. It is interesting to understand whether or not the DOL can adequately begin to repair the application process through the elimination of the attestation process and implementing the new compliance-based model. The claim of the DOL is that through the elimination of the attestation process, an increase in the efficiency of the process will occur. This is due to the fact that potential violations and deception of the application can be identified and fixed when they first occur, which is preferable to fixing problems after an investigation, as is currently happening.

As provided in an account by the Government Accountability Office, many times such fraud is not uncovered until after the terms of the contract has been initiated and completed and the case is in court. An example of this would include a company dealing with labor brokering and hospitality in Virginia. As was found in the criminal proceedings, this company obtained workers through fraudulent means and subsequently leased them out to various other companies. Frequently, a simple attestation process rather than certification with little oversight is considered to blame for allowing such practices to slip through the cracks and not be accounted for until it is too late.

**Limits**

Still in the pipeline for revision is the inclusion of a comprehensive definition for the types of temporary work that exist within the system. The Department of Labor has recently addressed a need to fix the definition due to the fact that for some types, as in the one-time occurrence, the extension for the H-2B worker can last for three years. While in other types, seasonal or peakload, the extension can only be granted for one year. Without this definition, it is difficult to protect the workers from abuse within the system.

Although there are regulations that are proposed to make sure that American workers are not discriminated against and are offered the same or better wages as their H-2B counterparts, another deficiency that has not been addressed within these proposed rules are the protections of wages for the H-2B workers. Granted, the proposed rules are primarily for the direct protection of the American worker and in fact make them more competitive and safeguarded, the proposed rule does not address the unnecessary garnishing of wages for the H-2B worker. Although the DOL has the power to audit employers at random, this can prove to be costly and is not pursued most of the time. As an alternative, we suggest decentralizing this power to the SWAs. This will not only ensure that the wages are being adequately kept according to the prevailing wage or higher, but also that certain allowances, for example exorbitant housing and transportation fees, are not being deducted from H-2B worker salaries in favor of the employer.

Through these changes proposed in the recruitment process, the employers are left with a new regulation that continues to satisfy their needs in obtaining H-2B workers when there is a need for them. Moreover, by replacing the attestation model, employers are bound by compliance and necessary documentation first before they are able to recruit. Through this necessary method and by submitting their application online, employers are also obligated to consider qualified U.S. workers for the position before they are able to seek international employees. Moreover, there needs to be further regulations in regards to the amount
of time and effort that employers are advertising to the American worker. It is our view that the current amount of advertising for American workers is extraordinarily minimal compared to the actual efforts that employers usually exhibit to seek H-2B workers. Unfortunately, the rules do not adequately address this issue and undeniably should.

**Conclusion**

The system that oversees the process for determining H-2B workers has been deficient for quite some time. The guidelines that have been put in place to protect the workers from being abused have been undermined by the current general administrative processes for applying for an H-2B visa. Furthermore, incentives or regulations need to be put in place to ensure that the employers are kept honest in the application process. A detailed approach and recommendations need to be developed from the ground-up to not only protect H-2B workers while they reside in the U.S. but more importantly, to ensure the system is in fact working for American workers. The challenge arises as to what is needed to happen in order to fix these problems. The proposed model does fix some of the problems but continues to fall short in promoting a healthy system from which American workers can benefit and gain the advantage they once had.

Currently, there are insufficient restrictions to protect workers in the present attestation practice. Given the constructs of this attestation model, we saw that employers simply had to attest to the DOL that they had a need for an H-2B worker with minor documentation. Therefore, minimal paperwork and research was needed from employers in the application process. The employers certainly must have a need for an H-2B worker, but the need can be ill-contrived and reasoned on behalf of the employer claiming worker shortages in the area. The attestation process lacks the necessary oversight, reduces the need for employers to actually aggressively advertise their unfilled positions, and provides an incentive for employers to claim workers that may come at an overall reduced cost for the employer.

**Recommendations**

Our analysis of the H-2B visa program has brought us to develop the following recommendations. It is our joint opinion that these measures ought to be enacted in order to improve the integrity of the H-2B program. Application and oversight inadequacies create many potential areas for the abuse of H-2B workers by intermediary bodies and U.S. employers. Similarly, by enabling U.S. employers to apply unnecessarily for H-2B workers at lower wage rates, the program is harming the American economy and labor market, thereby reducing opportunities for the American worker and increasing the reliance of U.S. employers on H-2B workers.

Also, current advertising standards for H-2B employers to the American workforce are inadequate and in need of reform. With the adoption of the recent Final Wage Rule, the H-2B program has been offered an opportunity to strengthen itself, to protect H-2B worker rights, to persecute abusive employers, and to offer the American labor market much needed employment opportunities at fair wage levels. This is not to say that the H-2B program is unnecessary, but rather that program oversights need to be adopted to return the program to its intended purpose to provide skilled specialty temporary labor to American employers, given a demand for labor that is unable to be filled by the current American workforce. Finally, as funding is always the key challenge when attempting to adopt and implement new processes, we have outlined many sources of funding that could easily be made available through H-2B program requirements, which can then be utilized to strengthen it.

**Oversight Creation and Strengthening the Application Process**

Many of the below recommendations are interconnected and rely on one another for their successful creation and adoption.

**Creation of an oversight division within the DOL and SWAs**

**Observation:** Currently there is inadequate protection for H-2B workers from the transgressions of H-2B employers who often violate worker rights through wage abuse, excessive fees, fraudulent documentation, and various general abuses. Our analysis of the literature revealed that out of a sample
of 15 cases, nine had instances of wage abuse, seven had excessive fees garnishing H-2B worker wages, six employers had submitted fraudulent documentation, and seven had committed general abuse against their H-2B employees.

**Recommendation:** It is our belief that the Department of Labor (DOL) ought to partner with the State Workforce Agencies (SWAs) in the delegation and enforcement of general H-2B program guidelines. While an independent body could be created to combat these issues, we believe it would be of greater utility to capitalize on the current partnerships that exist between them as stipulated under H-2B program application processes. For this proposed oversight, the DOL should be responsible for setting program guidelines to combat these abuses, but that these guidelines ought to be enforced by the SWAs at the state-level. SWAs can define their own processes to enforce DOL rulings, and provide a local face to employers, H-2B, and American workers. The DOL’s National Wage and Hour Division (WHD) should be decentralized to the state-level so that they can provide greater oversight to employer infringements and seek financial compensation from employers committing offenses. The goal of this reorganization is to create a state-level enforcement body that is accountable for enforcing the new H-2B Final Wage Rule, ensuring that H-2B employers are paying H-2B workers the highest prevailing wage as determined by either OES, the collective bargaining agreement, or the Davis-Bacon Act/Service Contract Act. This new state-level oversight will also be responsible for enforcing several other recommendations as articulated below.

**Funding Opportunity:** While acknowledging that this recommendation requires the creation of new positions and the corresponding training necessary for people to occupy those positions, there are opportunities for funding. To fund these SWA-level offices/employees, we have identified potential sources of income through instituting new application fees and processes for the intermediary bodies that identify, contact, and contract H-2B workers for U.S. employers. As there is currently no true oversight of these intermediary bodies, defining an application process and charging these bodies not only provides a needed source of income, but also presents the opportunity for their oversight and a reduction of intermediary-caused H-2B worker violations. In addition, the creation of an intermediary application process has the potential to generate funds, when violations have been found to occur, in the form of fines.

**Employee Protection Measures**

**Observation:** Currently there is inadequate protection for H-2B workers from employer and intermediary offenses. Employees often do not have an avenue to report abuses, nor would they willingly report the offenses as their employment status is tied to their employer which creates greater opportunities for employers to commit offenses against H-2B workers. It is our belief that providing additional information and resources to H-2B workers will greatly limit their abuse.

**Recommendation:** To combat these issues, it is our opinion that the DOL needs to create a complaint mechanism for H-2B workers. This could be done in one of two ways; however we believe that this complaint mechanism needs to remain anonymous so that employees are not fearful of identifying complaints about workplace abuses, low wages, wage garnishing, improper living conditions, etc.

The SWAs should issue complaint cards to H-2B workers through the DOL when they receive their H-2B visa along with self-addressed prepaid mailing envelopes. These forms should be in the H-2B workers’ native languages. Included with these cards should be a statement of known general offenses committed by employers against H-2B workers. Similarly, this information packet should include what their expected wages will be given the prevailing wage of the occupation in the state for which they are contracted to work, as well as the expected amount of taxes that should be removed and the fair market value for housing expenses that they can expect to be charged.

The DOL could create a hotline similar to NYC’s 311. This hotline should be multilingual, staffed, and provide a resource of information to H-2B workers. This hotline should offer H-2B workers a medium for anonymous complaints, be capable of providing them information on what their expected wages will be given the prevailing wage of the occupation in the state for which they are contracted to work, as well as the expected amount of taxes that should be removed and the fair market value for housing expenses that they can expect to be charged. Complaints issued to this hotline will need to be directed to the appropriate SWA for investigation.
As materials and information can be lost in transit, H-2B employers should be required to post informational posters in the workplace with additional complaint cards/envelopes or with the DOL complaint and information hotline telephone number. As employers may be concerned about fraudulent complaints, the DOL will need to set standards of what constitutes a valid offense/complaint. Similarly, a screening mechanism will be needed to assess these complaints on the state level. As SWAs will best be able to determine state H-2B worker wages for an occupation, state and federal taxes will be removed from paychecks, as well as identify expected housing expenses in the region, the SWAs should be responsible for screening, investigating, and prosecuting these offenses.

**Funding Opportunity:** Please see the following recommendation which will utilize this anonymous complaint system to generate revenue and support H-2B program integrity.

**Enforcement of the new Final Wage Rule: Creation of an Employer Ranking System Based on Audits and Transgressions Against H-2B Workers**

**Observation:** Currently, under e-CFR Data § 655.24, the OFLC, a part of the DOL, has the power to conduct audits, address audit violations, evaluate applications, and impose supervisory requirements. Unfortunately, employees are often unwilling to identify employer transgressions for fear of losing their H-2B visa. As a result, wage abuse, excessive fees, fraudulent documentation, and various general abuses often occur but are not reported, preventing the DOL from adequately identifying violators who ought to be audited or debarred from the program.

**Recommendation:** To rectify this deficiency, we recommend that the DOL establish an employer ranking system. Each H-2B employer ought to first have an audit conducted of their business at the time of application to establish their current financials, pay rates, etc. Then the OFLC should be contacted by the SWAs when they have received a fixed number (X) of valid employee anonymous complaints about transgressions committed by a particular employer. When X number of complaints have been received, the employer should be contacted and forced to pay for another audit of their business and employee practices. This may in effect restrain employers from unfairly garnishing H-2B worker wages, from requiring unpaid overtime, from charging excessive housing fees, or committing other abuses. This system could be utilized not only to identify abusive employers, but also to provide an incentive for proper employer practices. For example, a rating system could be implemented that offers employers reduced application fees when the audits conducted have proven that they are regularly adhering to program standards. Thus, if employers receive high scores based on their audits, they would receive a financial incentive for continued adherence.

Another measure that would limit the number of fraudulent applications would be to require employers to pay a fee based on the total number of H-2B workers that they are requesting. By charging employers a fee reflective of the number of H-2B workers desired, will deter employers from submitting applications for unnecessary numbers of workers. This financial disincentive for employers may free up funds on the screening end of the program.

A further frequent area of abuse against H-2B employees is a failure of employers to carry all of the costs incurred by H-2B workers and their relocation to their new worksite. These costs occur in the forms of transportation costs to and from the U.S., to and from their residence/worksite, material/tool costs, application fees, intermediary recruitment costs, etc. A regular financial audit and ranking system could easily identify where employers were failing to take on these H-2B worker costs by comparing reimbursed amounts to H-2B workers, as well as the essential occupational costs they have failed to cover. Making this a contingent part of the audit process and providing employer incentives could negate future transgressions against H-2B workers. To further enforce this recommendation, the DOL should stipulate that employers found in violation of these program standards will face permanent debarment from participation in the H-2B program.

**Funding Opportunity:** This recommendation will provide funds in the form of employer-paid audits, application fees that reflect the number of H-2B workers that an employer requests, as well as freed-up funds from the screening-end of the application process.

**Intermediary Body Application Process/Requirements**

**Observation:** Currently, intermediary bodies are not held accountable to any set standards for H-2B
program participation. Under Subpart A, employers are responsible for ensuring that the intermediary bodies that they contract with are not charging fees to potential H-2B workers; however, the literature states that fees are often collected without an employer’s knowledge or that they claim ignorance of such fees when they are identified.

**Recommendation:** To combat this offense, we believe that an application system needs to be implemented for H-2B intermediary bodies. This recommendation is an essential part of strengthening the H-2B worker program. Requiring intermediary bodies to undergo an application process requires them to buy into the system in order to participate in the program. Similarly, requiring that U.S. H-2B employers only contract with U.S. certified intermediaries removes the likelihood of their contracting with intermediaries who are engaged in questionable activities. Intermediary bodies provide a necessary service to the H-2B program as they identify and make connections between potential H-2B workers and H-2B employers. While the service that these bodies provide is necessary, they are often lacking oversight and thus are not accountable to the H-2B program. Also, many intermediary bodies reside in foreign nations, adding additional difficulties for ensuring oversight. Requiring an intermediary application makes these foreign bodies accountable to DOL set standards because H-2B employers would be required to only contract with intermediary bodies that have undergone the intermediary application process. An intermediary’s failure to comply with these newly established standards must result in their removal from program participation. It should also be noted that there are two types of intermediary bodies that should be required to participate in this application process:

- American Temp/Worker Agencies who work with U.S. employers to establish H-2B worker need
- Foreign Recruiting Intermediaries who identify and work with potential H-2B workers overseas

While some U.S. employers contract with both of these types of intermediaries, both should be required to participate in new application standards. Employers who utilize multiple intermediaries should understand that this choice is part of their cost of doing business with multiple entities. By requiring both types to participate in application processes, the DOL can mandate that program participation requires submissions of financials to an auditor, thus ensuring that their revenues are not being generated by taking advantage of potential H-2B workers and that they are not participating in questionable activities. In addition to a validation of finances, this process will permit the DOL to examine intermediary recruitment methods. These applications should require annual recertification to ensure that intermediaries are adhering to best practice procedures. The regulation of intermediary bodies to set standards will eliminate the emergence of job-shops.

We believe it is important to note that intermediary application standards must be regulated on the federal-level by the DOL. If administered on a state-level there may be an incentive to create less strict guidelines so that H-2B workers will benefit state specific companies. Creating federally set standards for intermediary bodies will prevent any favoritism from occurring on the state-level.

**Funding Opportunity:** The implementation of intermediary body application fees for this recommendation will provide an opportunity for the DOL to generate significant revenue for the H-2B program.

**Job Database Creation**

**Observation:** The literature reveals that H-2B job opportunities are advertised by employers to the American workforce to minimum standards. The advertisement of H-2B jobs up to five months prior to employers expecting to fulfill the position through three consecutive days of newspaper advertisement, one of which must be on a weekend, does not provide American workers a true opportunity to identify and fill these temporary/seasonal positions. Most seasonal workers do not begin searching for employment until considerably closer to the position’s start date. Similarly, the literature states that employers often ask the newspapers with which they have posted their advertisement to refrain from posting it on their web listings or to remove it if it has been posted. Some employers are beginning to rely strictly on H-2B workers and the lower levels of pay that they are willing to accept and so do not wish to seek to fill the position with an American worker that will demand prevailing wage amounts.

**Recommendation:** It is our opinion that the SWAs ought to create a state database of seasonal H-2B positions through which employers are required to post
their listing with them until the time that the position is to start. This resource will enable American workers to have reliable access to typical H-2B positions. The creation of this database would also enable American unemployment agencies to easily access and identify positions for which they may have unemployed workers who are willing to work in the occupation. Requiring listings to exist in an accessible format for a significantly longer duration than the current minimum advertising standards will better enable potential H-2B employers to identify and employ American workers. We believe it is important that this database be kept and maintained by SWAs and not a national body so that states are easily able to identify and funnel U.S. workers to potential H-2B employers. For ease of access, this database should have a search function that enables American workers to choose an occupation and be presented with a list of employers with these occupational positions available. It may also be worthwhile to enable American workers to apply directly for these positions through this online database system so that SWAs are able to identify where employers are failing to contract American workers in favor of H-2B employees. We recognize that the newly proposed final rule states the need for the creation of a job database; however we feel that these additional standards ought to be implemented to ensure that it has the greatest potential to aid American workers.

**Funding Opportunity:** If a state job database is created for H-2B jobs, then there would no longer be a need for employers to post newspaper advertisements as the SWAs could advertise the existence of the entirety of the database rather than a specific position. To fund this project, since employers are now no longer required to submit newspaper advertisements, they could be charged a reasonable fee for advertising in their application process which could be used to fund and maintain the database. Similarly, employers could be charged a fee for each position posted/advertised, also generating revenue.

**Legal Services for H-2B Workers**

**Observation:** Currently there is no program legislation in place to provide H-2B workers with access to legal services. While the implementation of the above recommendation will help H-2B employees identify and report abuses, some form of legal service should exist for program participants.

**Recommendation:** The H-2B program ought to offer H-2B workers access to legal services. During our research we noted that federal funding is provided to H-2A workers for legal services, but that H-2B workers are ineligible for funding for legal services. Since H-2B workers are the subjects of wage abuse, excessive fees, fraudulent documentation, and various general abuses, these workers are most in need to access to legal services to rectify employer committed offenses. By providing access to legal services, the H-2B program would become strengthened as the DOL could deny employer applications based on the identification of past offenses, which only come to light when means of arbitration are available. Also, by strengthening requirements governing the denial of employer applications due to past offenses, it is our belief that employers will refrain from taking illegal measures against their employees, such as the workplace collection of visas.

**Funding Opportunity:** Funding for this recommendation should be provided on the federal-level as it is for the H-2A program. Similarly, funding could be provided on the state-level, however as abuses are committed across the nation, funding should come from the federal-level so that all H-2B employees, regardless of their state of employment, receive the same legal services.

**Funding Opportunity Enabling Oversight Creation**

**Recommendation:** The aforementioned oversight division could be funded through a one-time federal grant and then maintained by the application fees that have been articulated above. Therefore it is our opinion that the DOL and SWAs should jointly petition for a federal grant to ensure the creation of a much needed oversight division. Therefore we recommend seeking funding through all possible avenues, federal grant funding included.

**H-2B Worker Mobility, Worker Overstay, and Tracking**

**Observation:** Currently H-2B workers are restricted from changing occupations and employers while in the U.S., thus binding them to their contracted position. Unfortunately, this also makes them entirely reliant on their employer for their visa status and enables H-2B employers to commit abuses against H-2B workers who are unwilling to jeopardize their visa-status by complaining.

**Recommendation:** The possibility of enabling H-2B mobility once within the U.S. ought to be investigated.
By permitting H-2B workers the ability to transfer their H-2B visa to another employer who can identify need, H-2B worker rights could be upheld as they would have the opportunity to leave an abusive situation while remaining employed in a position for which they are qualified. This recommendation may not be necessary if the aforesaid complaint mechanisms and oversight are created as H-2B workers would then have avenues to complain and seek legal assistance; however, as the program is currently structured, this is a valid need. If the DOL did decide to permit H-2B workers to move to other positions, a tracking system ought to be developed and utilized. As overstays is already a growing problem among the H-2B population, the DOL ought to either issue ID cards or track visa numbers from entry into the program, through employment, and then to exiting the country. Currently, tracking standards are inadequate resulting in a growing undocumented U.S. population.

**Funding Opportunity:** This recommendation does not generate any specific funds, however it will reduce the financial burden to society of additional undocumented workers residing within the U.S..

**Modification to the H-2B Program**

**Observation:** Currently the H-2B program is failing to provide the true specialty temporary labor that it was intended to at its creation. Instead, U.S. employers utilize the program to bring in cheap foreign labor at the expense of higher U.S. worker wages, thus enabling them to make a greater profit. In our analysis, we conducted a wage comparison which revealed that H-2B workers are significantly underpaid. Only in a few specialty occupations were H-2B workers seen to be paid a higher than average amount.

**Recommendation:** Strict enforcement of the new H-2B Final Wage Rule, a reassessment of the program cap, oversight of employer offenses, and greater job search capabilities through SWAs will help address this need, but as the program currently stands, the DOL needs to restate what positions the H-2B worker is intended to fulfill. Without new restrictions, the DOL is communicating that it is permissible for H-2B workers to continue as a cheap labor alternative for American employers.

However, new restrictions that stipulate what truly constitutes a temporary worker, permissible occupations for these positions, and what constitutes employer need for this temporary labor can be enacted. Similarly, the temporary nature of these positions needs to be enforced as employers often petition for H-2B employees for a recurring seasonal need, thus not a truly temporary need, or for multiple contracts that overlap, thus undermining the temporary nature of the program. During our analysis, we provided an example of a Brazilian cook being better able to prepare Brazilian cuisine than an American counterpart, thus identifying it as a special position that warrants a program to bring them into the U.S. to provide a needed service, but even this position begs the question of whether it is truly temporary in nature. The obvious answer is “no.” After reviewing a list of H-2B worker occupations, few appear temporary in nature. This aspect of the program needs reevaluation and modification so that program integrity can be maintained.

**Funding Opportunity:** This recommendation does not generate any specific funds, however it will permit funds to be generated through application and screening processes. This recommendation also warrants the reassessment of the H-2B program cap which has fund generating potential.

**Reassessment of Program Cap**

**Observation:** Currently the H-2B program is capped at 66,000. Despite the recent economic crisis in the U.S. and the national rising unemployment rate, the H-2B cap has been reached earlier and earlier each year. Similarly, the literature cites examples in which businesses sought H-2B workers in cities that had large unemployed populations in the industry that was petitioned for. When local unemployment offices were contacted, researchers were told that they had workers who were willing to work at the stated wages for the position, but employers had either inadequately advertised the position or failed to advertise the position at all.

**Recommendation:** It is our opinion that the program cap should reflect the yearly economic state of the U.S. economy and workforce. H-2B program numbers should also be reflective of unemployment rates in the U.S. The creation of a job database for American workers through SWAs is a necessary method of connecting potential employees with employers, however this alone will not solve the problem if an arbitrary cap number remains. To solve this dilemma and identify a true program cap, the DOL should work with SWAs to identify where there is market need. In the newly proposed Final Rule, the DOL identifies SWAs as critical agencies that are
in need of revitalization. This revitalization could occur through the proposed oversight division and by empowering them to contribute to yearly program cap determinations. Since SWAs already have the ability and trust of the DOL to conduct labor market tests within each state/region, the SWAs could conduct an annual test that would reflect the true needs for H-2B workers within each state/region, and that could be totaled into a national program cap recommendation. This recommendation should then be presented to Congress annually for determination of a new program cap that is reflective of the entire nation’s need. This method would ensure that the H-2B program cap reflects the state of the U.S. economy and its workforce’s ability to fulfill H-2B occupational positions.

**Funding Opportunity:** While a restatement of the program as stipulated above in our program modification recommendation may initially reduce the number of H-2B visas issued, there may be a real need for more H-2B workers than the cap currently permits. Under our employer ranking system, we believe that the potential exists to charge employers fees dictated by the number of H-2B workers that they apply for. A reassessment of the program cap could result in the generation of funds depending on how high the yearly H-2B cap amount is set, an amount that should directly reflect the American economic need for H-2B workers.

**Conclusion**

The H-2B visa program was designed as a non-immigrant worker program that allows employers to hire temporary, non-agricultural foreign labor. Employers can hire H-2B workers on a one-time, seasonal, peak-load, or intermittent basis. The H-2B program began in 1986 as part of the Immigration Reform and Control Act in which the H-2B program was separated from the H-2A program. In 1990, an arbitrary annual visa allowance cap was set at 66,000, and has not been adjusted since. The H-2B program is intended to provide temporary foreign labor for positions in which U.S. employers could not find American workers willing/able to perform the tasks. The presence of H-2B workers should not have any bearing on the wages and working conditions of their American counterparts. For the process to be successful, it is supposed to be the case that the employment of an H-2B visa holder does not harmfully affect the wages and the conditions of U.S. workers that work in similar industries.

Furthermore, the H-2B visa is nontransferable, meaning the guest worker cannot seek employment opportunities outside of the contracted employer. This condition means that an H-2B employee’s legal status in the U.S. is directly tied to their employment, ultimately enabling an avenue for worker abuse. The H-2B visa is allocated for up to 10 months, but under certain circumstances may be extended for up to three years. Wages for H-2B workers are determined as the highest of the Federal minimum wage, the State minimum wage, and the prevailing wage.

An important stipulation of H-2B visa contraction is that an employer may not contract with a foreign labor contractor/recruiter that has received payment from potential H-2B employees for a job placement in the U.S. One area in which there is limited labor protection is the existence and use of intermediary bodies. Intermediaries are the agencies that match up guest workers with employers, sometimes for a fee to the employers (employer-based), sometimes for a fee to the worker (employee-based), sometimes for free (ambiguous-based), and sometimes through a database accessible to employers, employees and other intermediaries. Employee-based intermediaries are illegal, but continue to exist. They often charge exorbitant fees to the potential H-2B employee, putting that employee in substantial debt before they even arrive in the U.S. With the pressure to pay back these intermediary bodies, the employees are unlikely
to complain about workplace conditions for fear of losing their jobs and the inability to pay off their debts. The level of debt that workers can accrue through underhanded transactions with recruiters (which are explicitly forbidden in contracts) can disable the workers from collecting a real wage to provide for their families or accumulate for themselves.

With an employee’s legal status contingent on the fact that they keep their job, this can lead to an over-reliance on the employer and may result in limited complaints to outside sources if situations are abusive. The maltreatment of the H-2B worker stems from the substantial power that the employer has over the worker. There are cases in which overtime wages have not been paid, or in which H-2B workers have not received the necessary hours they were initially promised in their contract. Employers often deduct housing fees, visa application fees, and transportation fees from employee wages, even though this essentially lowers the true wages for the employee.

In the cases reviewed in our analysis, there were instances of: a) wage abuse in which H-2B employees were paid less than the prevailing wage and/or did not pay overtime; b) excessive fees withdrawn from H-2B employees’ paychecks; c) fraudulent documentation sent to government officials; and d) general abuse, taking into account the conditions of the workplace, threats by the employer, and employee documentation being withheld. This inferior position, in turn, undermines the bargaining power of the U.S. workers. If H-2B workers do not have the power to bargain for higher wages and better conditions, then their U.S. counterparts will also have less bargaining power.

We also looked at wages paid to H-2B employees. First, our analysis compared the highest state minimum wage to the prevailing wage determined by OES and found that the prevailing wage was still higher than the highest state minimum wage. Thus, according to the Final Rule on the calculation of the H-2B workers wages, the wage rate that H-2B workers get paid should be at least the mean wage rate established by the OES, provided the OES wage survey is defined as the prevailing wage. Next, we identified and examined whether the existing wages paid to H-2B workers are higher, lower, or equal to the OES prevailing wages. To conduct this wage comparison, we focused on the top six states that admitted more than 2,000 H-2B workers. The wage comparison/gap analysis showed that most wages paid to the H-2B workers are lower than the prevailing wage for the occupations as defined by the OES for each particular state. The differences from our samples range from $0.37 to $5.69 per hour, with most of the differences being statistically significant. This is to say, we infer that most employers hiring H-2B workers do not comply with the newly released Final Rule. In general, the low wages witnessed within these states serves as an indication that most other states in the U.S. likely underpay similarly employed H-2B workers.

We also conducted an economic analysis of the H-2B program, in which we examined the cases of a boom and recession economy, identifying that the introduction of the H-2B program could drag down the overall wages paid to the US workers as the program essentially increases the supply of labors in the U.S., which results in more people competing for a given wage. Moreover, U.S. workers are more likely to face lay-off since H-2B workers have incentives to work harder to avoid deportation and to accept lower wages if it guarantees them employment and participation in the H-2B visa program.

The fixed cap of 66,000 every year does not economically make sense, nor does it reflect the needs of the U.S. labor market. Obviously, Congress’ unchanging yearly cap overlooks the changing economic conditions of the U.S. The cap reached when the unemployment rate is 8 percent should be significantly different from the cap reached when the unemployment rate is 18 percent. If the cap were set at a lower amount, then, if an economic recession were to hit, employers would not be able to substitute cheaper foreign labor at the expense of American workers.

After conducting a literature review and thorough analysis of the H-2B program, we offer numerous recommendations to improve the program integrity. The first six recommendations are related in that they are part of a plan to create general oversight and strengthen the application process.

- The first recommendation is the creation of an oversight division within the DOL and SWAs to combat the common abuses within the H-2B program.
- The second recommendation is to create employee protection measures by creating a complaint mechanism for employees experiencing abuse at work.
The third recommendation is to enforce the new Final Wage Rule by creating an employer ranking system based on audits and transgressions against H-2B workers. The audits would be able to determine a rank for U.S. employers, with benefits for employers who adhere to most/all requirements, thus disincentivizing the employers from abusing the H-2B workers.

The fourth recommendation is the creation of an intermediary body application process and requirements in an attempt to regulate these bodies so that they do not charge excessive fees to employees for a job placement in the U.S.

The fifth recommendation is the creation of a job database through the SWAs to improve recruitment efforts of American workers for typical H-2B jobs prior to bringing in H-2B workers. American workers are, under the H-2B program, supposed to be given preference to access to jobs, but this has not been the case as has been discussed.

The sixth recommendation related to the general oversight creation and strengthening of the application process is the addition of legal services for H-2B workers. During our research we found that H-2B workers are not offered federally funded legal services if they want to take their employer/recruiter to court, even though H-2A employees are guaranteed this funding.

The seventh recommendation is to potentially limit the ties employees have to their employers by increasing their mobility across H-2B employers. If the first six recommendations are put into place, and employees have more ability to complain if abuse is occurring and employers have fewer incentives to abuse their employees, then this recommendation may not be necessary. However, as the program stands now, much of the abuse that H-2B workers suffer is directly related to their relationship to their employer.

The eighth recommendation is a modification of the H-2B program. By this we mean that the DOL needs to restate the purpose of the H-2B program, because currently the program allows for H-2B workers to be a source of cheap labor for U.S. employers. However, this was never the intended purpose of the program – the intended purpose was to bring in employees from foreign nations to fulfill specialty temporary positions. This can occur through the enforcement of the Final Wage Rule, a reassessment of the program cap, the increased oversight of employer offenses, and the increased job search capabilities of American workers.

Lastly, the ninth recommendation is the reassessment of the program cap. Currently the program cap is set arbitrarily and does not reflect the market need. We propose that the SWAs and DOL work together to gather information on the market need and make yearly recommendations for the cap, so that the cap is an actual reflection of U.S. need for H-2B employees.

Our case study analysis of the newly proposed H-2B visa legislation revealed that efforts are currently underway to reinforce program integrity by moving the current attestation process to a front-end compliance based system. While this bill will ultimately address some of the program’s deficiencies, it still falls short of providing the necessary comprehensive program reform that we have determined necessary. This bill, coupled with the new Final Wage Rule released in January of 2011, presents a unique opportunity for a positive reform of the H-2B visa program, as well as a potential avenue to create and enforce the necessary lacking oversight.

Overall, our case study, literature review and thorough analysis have illuminated key areas for H-2B program reform and culminated in our recommendations for the betterment of the program. We feel our recommendations will improve the conditions for both H-2B and American employees, will incentivize U.S. employers to treat their employees well and work only with certified and audited recruitment bodies, will provide a more accurate representation of the market need for H-2B employees through the reassessment of the program cap, and will renew the H-2B program so that the employees will truly be a unique force that cannot be found in the U.S.
Appendix A:

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End Notes


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