

New Labor Department Rules Curb Discrimination against U.S. Workers and Trafficking of Foreign Workers under the H-2B Guestworker Program

On February 21, 2012, the U.S. Department of Labor (DOL) issued final regulations to reform the H-2B guestworker program. **The regulations, long overdue, are designed to preserve jobs and protect both U.S. and foreign workers.** These regulations are slated to take effect on April 23, 2012. Senators and Representatives opposed to these common-sense rules have drafted Congressional resolutions officially expressing their disapproval.

The H-2B visa program allows U.S. employers to hire temporary foreign workers to meet seasonal demands in non-agricultural jobs, provided that employers show that (1) no workers in the U.S. are available for the work, and (2) hiring H-2B workers will not negatively affect the wages and working conditions of workers in the U.S. doing similar work. The most common industries in which H-2B workers are employed are landscaping, tourism and hospitality, forestry and conservation, food processing and construction.

At its peak in 2007, 129,547 H-2B visas were issued. The program is currently capped at 66,000 visas, with the largest numbers of H-2B workers coming to Texas, Florida, Colorado, Virginia, Louisiana, New York, Maryland, Pennsylvania, North Carolina, and Utah.

Misuse of the H-2B program by employers and their agents is widespread and well-documented.

Employers in certain sectors have abused the program to bypass available U.S. workers, and numerous recent cases have brought national attention to the involuntary servitude, human trafficking, and other gross exploitation of foreign workers recruited under this program, where these workers are tied to the sponsoring employer.

The DOL's regulations are designed to ensure that participating employers make a real effort to recruit and hire workers in the U.S. for jobs, and to guard against the human rights violations – including debt peonage, labor trafficking, wage theft, and involuntary servitude – that have plagued this program.¹

Below are incidents of (1) employers abusing the H-2B program to bypass available U.S. workers and (2) human trafficking cases and other examples of severe exploitation involving foreign H-2B workers. These examples show just how crucial DOL's long-overdue regulations are in curbing some of the worst abuses of this program.

Examples of Misuse of H-2B Guestworker Program to Bypass Available Workers in the U.S.

- Posing as prospective H-2B employers, in 2010, undercover investigators from the U.S. Government Accountability Office captured recruiters suggesting how to circumvent program rules². These suggestions included:
 - Discouraging U.S. workers from accepting landscaping positions by requiring applicants to run with a 50 pound bag to determine if they were fit to work;
 - Conducting interviews before 7 a.m. in order to “weed out” U.S. worker applicants; and
 - Offering to provide “good excuses” (not specified in the GAO report) that employers could use to help “weed out” U.S. workers who were applying for housekeeping positions.
- A Kansas City Star expose on the H-2B program reported on an East Coast visa fraud scheme where employers scheduled interviews with U.S. workers for inconvenient times, like 6pm on Christmas Eve. Workers who did show up for these interviews reported afterward that the interviewers were “intimidating” and made the positions sound “as bad as possible”.³
- A 2011 U.S. DOL audit of H-2B forestry employers in Oregon found that U.S. workers who applied for job openings reported that the prospective employer used discouraging language during the interview. Such language included references to applicants’ age and the ability to speak another language, neither of which were valid conditions of employment.⁴
- Oregon forestry employers placed ads for open positions in small newspapers in California and Washington, despite the fact that the bulk of the work was to take place in Oregon. These employers also posted job orders with State Workforce Agencies outside of Oregon, leading the Inspector General’s Office of the U.S. DOL to conclude in a 2011 audit that “workers in Oregon were likely unaware that these job opportunities were available.”⁵
- In Texas, three agricultural employers misclassified their jobs as non-agricultural in order to qualify for the H-2B non-agricultural program and avoid the (relatively) more stringent U.S. worker recruitment rules under the H-2A agricultural program. Over 400 workers came in under the H-2B program, and worked harvesting watermelons and onions. Meanwhile, state workforce agencies in Texas and Arkansas referred about 720 workers for these jobs, almost all of whom were rejected.⁶
- In 2011, U.S. workers in Tennessee sued a company providing temporary labor on environmental hazard removal projects, alleging that the reasons it gave in its H-2B application for failing to hire U.S. workers were false and a pretext for discriminating against U.S. workers. The lawsuit alleged that although the company said the U.S. workers declined interviews or employment because they could not start work on the required date or had moved out of the area, in fact, the workers were available to work at any time. One worker alleged that he had

been told he was in fact hired, only to show up and be told that they had hired somebody else with better qualifications.⁷

- In Pennsylvania, the Justice Department charged a temporary recruitment agency with placing advertisements “for non-existent employment positions, and then submitting the fraudulent advertisements to state employment agencies, to falsely show that the jobs were available to U.S. workers and that no U.S. workers had applied for the position.” The temp agency also stockpiled H-2B visas by applying for more than its client businesses required, and randomly selected names from a Mexico City phonebook to put on the fraudulent visa petitions they submitted.⁸ The individual defendants pled guilty to participating in this visa fraud scheme.
- After a U.S. DOL investigation found that a landscaping company in Tennessee did not conduct the required recruitment of U.S. workers, the landscaping company agreed to pay \$18,000 in civil money penalties and to 3-year suspension from participation in the H-2B program.⁹
- Following allegations that it discriminated against U.S. workers in favor of H-2B workers, a landscaping company in Virginia agreed to pay \$11,173 in backpay to a U.S. worker who had applied for but was not given a job. The company also agreed to modify its hiring policy to extend the time period during which it would recruit U.S. workers.¹⁰

Examples of Human Trafficking and Exploitation of Foreign Workers Under the H-2B Program

- In 2006, the Equal Employment Opportunities Commission (EEOC) settled charges that 48 Thai welders, contracted under H-2B visas by Trans Bay Steel, Inc. and a third party agency for work in California, were held against their will, had their passports confiscated, had their movements restricted, and were forced to work without pay. Additionally, some workers were confined to cramped apartments without electricity, water, or gas. At least 17 of the workers were told if they tried to leave the location where they were being forcibly held, police and immigration officials would be called to arrest them. EEOC also alleged that all the workers were made to pay exorbitant “fees” to the recruiting company which kept them in involuntary servitude. Ultimately, some of the workers escaped the slave-like conditions.
- In West Palm Beach in 2010, 13 Filipino workers alleged that the staffing agency that brought them to the United States placed them in “severely overcrowded” homes in Miami and New York and forced them to work long hours in country clubs and hotels for virtually no pay. To keep the workers on the job, the agency threatened them with arrest, imprisonment, deportation, cancellation of their visas, loss of work, lawsuits and blacklisting. One worker says that after deducting for housing and living expenses, Star One Staffing paid her \$1.50 for a month's work.¹¹
- Indian workers, recruited to work for Falcon Steel Structures, Inc. in Louisiana, were promised full-time employment for at least two years. Workers paid between \$7,000 and \$20,000 in recruitment fees, often by obtaining loans in India at high interest rates. Workers allege that the company confiscated their passports, housed them in poor conditions with little food, and

threatened them with punitive measures for complaining. Company representatives demanded an additional \$5,000 for already promised permanent resident status.¹²

- A group of 500 Indian welders contend that they paid exorbitant fees of up to \$20,000 for recruitment, immigration processing and travel.¹³ Workers maintain that unbeknownst to them, they were never eligible to obtain the promised green cards and that, upon arrival in the United States in 2006, Signal International, LLC subjected them to serious abuses and forced labor at labor camps in Pascagoula, Mississippi and in Orange, Texas.¹⁴ As one worker testified before Congress: “Upon our arrival in the United States, Signal required us to live in guarded, overcrowded, and isolated labor camps. Signal further deceived us regarding our visa status, threatened us with loss of immigration status and deportation, and generally perpetrated a campaign of psychological abuse, coercion, and fraud designed to render us afraid, intimidated, and unable to leave Signal’s employ.”— Indian welder and [National Guestworker Alliance](#) member Aby Raju.¹⁵
- A U.S. Department of Justice prosecution established that Timothy Bradley and Mary Kate O'Dell operated the Bradley Tree Service, a tree-cutting and removal service, in Litchfield, New Hampshire. In the spring and summer of 2000 and 2001, Bradley and O'Dell used false promises of good work and pay to recruit four Jamaican men. Once the men arrived in New Hampshire, Bradley and O'Dell forced them to live in a tool shed and a trailer in their backyard, without adequate heating or plumbing, and charged each man \$50 per week for rent. Bradley and O'Dell threatened the men with serious harm and used physical restraint and psychological coercion to obtain their labor and services. They confiscated the victims' passports and tickets so they could not return home to Jamaica. Bradley physically assaulted one of the workers by choking, striking, and kicking him – and as the worker fled, Bradley ordered his German Shepherd dog to attack him.¹⁶ Both Bradley and O'Dell were sentenced to 70 months in prison.¹⁷
- In Arkansas, a forestry employer confiscated workers’ H-2B visa extension documents, which showed that they were allowed to be employed in the United States, and threatened the workers with immigration consequences if they left work prior to the end of their contract.¹⁸
- In *United States v. Askarkhodjaev*, the Department of Justice secured a 12 year sentence against the lead defendant in a human trafficking and organized crime prosecution that dismantled a multi-national, organized criminal enterprise that exploited over 1,000 guestworkers. The defendant operated a labor leasing firm that fraudulently secured H-2B visas, luring over 1,000 guestworkers from multiple countries to the U.S. Upon arrival, these workers worked mainly in the hotel industry in 14 states, and faced extreme exploitation by the enterprise. The alleged exploitation included requiring workers to live in crowded apartments that the enterprise charged exorbitant rates for; and excessive fees and expenses, which combined with lack of payment or underpayment for hours worked and lack of work assignments frequently resulted in workers receiving a paycheck with negative earnings. The exploitation and intimidation of these foreign workers through fear, threats of deportation, and

other adverse immigration consequences subjected them to conditions of servitude. Ten defendants were convicted in this prosecution.¹⁹

- The carnival company Dreamland Amusements, Inc. in New York was a nightmare for scores of employees who were forced to work 70 hours a week as ride operators at less than minimum wage, and housed in unsanitary and overcrowded trailers.²⁰ "We were paid \$300 a week and we had to buy our own meals and stay in trailers with roaches and bedbugs," Jose de Lira, 42, said in an interview. "They were really dirty."
- In 2010, Mexican workers sued their employer, Peter's Fine Greek Food, for using false promises to recruit them to work at the New York State Fair and other venues, and of threatening them with deportation if they complained. The workers' contracts guaranteed wages of \$10 to \$12 an hour, but they received between \$1 and \$4 per hour.²¹ Some of the workers went to a health clinic where staff members saw evidence that they had been bitten by bed bugs, suffered from dehydration and were sleep-deprived. The Mexican workers put in up to 16 hours a day for two weeks straight without being paid overtime.
- Twenty-four H-2B workers from Guatemala, Nicaragua and Mexico were promised jobs in Pennsylvania and New Jersey. When they arrived, however, they were told that in order to continue employment with the company, they would have to go to Mississippi and other states instead to do forestry work. The forestry company and its recruiters also reportedly misled the workers about the status of their visa extensions, threatened them with serious immigration or legal consequences if they left employment, and preyed upon the workers' fear, poverty, and isolation to force them to stay and work, regardless of the circumstances of the employment.²²
- Owners of a hotel in Oacoma, South Dakota were convicted of peonage, document servitude, visa fraud, making false statements, and conspiracy for bringing Filipino workers into the United States, then using threats of legal coercion, physical harm, and other threats to compel the workers into service in their hotel. Defendants were sentenced to 50 and 36 months in prison in 2008.²³
- Temporary guestworkers were recruited and brought from Mexico by a landscaping company to work on public contracts the company had with the Tennessee Department of Transportation for highway mowing and litter removal. Workers asserted that the employer confiscated passports and visas, threatened them by brandishing firearms, prohibited them from leaving the employer's "labor camp" without a supervisor, failed to pay them for all hours worked, and retaliated against workers who raised concerns about these conditions.²⁴

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- ¹ A summary of the rules is available at <http://www.dol.gov/whd/immigration/H2BFinalRule/index.htm>.
- ² U.S. Gov't Accountability Office, GAO-10-1053, "H-2B Visa Program: Closed Civil and Criminal Cases Illustrate Instances of H-2B Workers Being Targets of Fraud and Abuse (Sept. 2010), available at <http://www.gao.gov/assets/320/310640.pdf>
- ³ Mark Morris, "Work visa program is rife with problems," THE KANSAS CITY STAR (Dec. 14, 2009), available at <http://www.kansascity.com/2009/12/14/1630974/work-visa-program-is-rife-with.html>
- ⁴ U.S. Dep't of Labor, Office of the Inspector General, Report No. 17-12-001-03-321, "Program Design Issues Hampered ETA's Ability to Ensure the H-2B Visa Program Provided Adequate Protections for U.S. Forestry Workers in Oregon," (Oct. 17, 2011), available at <http://www.oig.dol.gov/public/reports/oa/2012/17-12-001-03-321.pdf>
- ⁵ U.S. Dep't of Labor, Office of the Inspector General, Report No. 17-12-001-03-321, "Program Design Issues Hampered ETA's Ability to Ensure the H-2B Visa Program Provided Adequate Protections for U.S. Forestry Workers in Oregon," (Oct. 17, 2011), available at <http://www.oig.dol.gov/public/reports/oa/2012/17-12-001-03-321.pdf>
- ⁶ Farmworker Justice, "Litany of Abuses: More – Not Fewer – Labor Protections Needed in the H-2A Guestworker Program," (Dec. 2008), available at http://www.fwjustice.org/images/stories/imm_labor_files/LitanyofAbuseReport_Dec2008_FINAL.pdf
- ⁷ *Martinez v. Cumberland Environmental Resource Co.*, U.S. District Court for the Middle District of Tennessee, Complaint, available at <http://www.guestworkeralliance.org/wp-content/uploads/2011/05/Cumberland-complaint-FINAL-8-7-09.pdf>
- ⁸ *U.S. v. Glah et al*, U.S. District Court for the Eastern District of Pennsylvania, U.S. Attorney Charge, available at <http://www.justice.gov/usao/pae/News/Pr/2009/dec/GlahInfo.pdf>
- ⁹ U.S. Dep't of Labor, Wage and Hour Div., Press Release, "Vanderbilt Landscaping pays \$18,000 fine following US Department of Labor investigations into violations of H-2B temporary nonimmigrant worker program," (June 27, 2011), available at <http://www.dol.gov/opa/media/press/whd/whd20110929.htm>
- ¹⁰ U.S. Dep't of Justice, Press Release, "Justice Department Settles Citizenship Status Discrimination Matter Against ValleyCrest Landscape Companies," (May 14, 2010), available at <http://www.justice.gov/opa/pr/2010/May/10-crt-577.html>
- ¹¹ *Magnifico v. Villanueva*, 783 F.Supp.2d 1217 (S.D. FL. 2011)
- ¹² *Abraham v. Singh*, 480 F.3d 351 (5th Cir. 2007)
- ¹³ Julia Preston, "Suit Points to Guest Worker Program Flaws," N.Y. TIMES (Feb. 1, 2010), available at <http://www.nytimes.com/2010/02/02/us/02immig.html>
- ¹⁴ *David v. Signal International*, 735 F.Supp.2d 440, (E.D. La. 2010)
- ¹⁵ [Congressional Testimony of Aby Raju](#), Member of the National Guestworker Alliance
- ¹⁶ *U.S. v. Bradley and O'Dell*, 390 F.3d 145 (1st Cir. 2004)
- ¹⁷ U.S. Dep't. of Justice, Criminal Section Case Summaries, available at <http://www.justice.gov/crt/about/crm/selcases.php#humantrafficking>
- ¹⁸ *Ramos-Madrigal v. Mendiola Forestry Service*, 799 F.Supp.2d 958 (W.D. Ark. 2011)
- ¹⁹ *U.S. v. Askarkhodjaev*, 2010 WL 4038783 (8th Cir. 2011)
- ²⁰ New York State Office of Attorney Assurance of Discontinuance and General Findings, available at http://www.ag.ny.gov/sites/default/files/pdfs/bureaus/civil_rights/Dreamland%20AOD.pdf
- ²¹ John O'Brien, "NY state fair vendor is accused of human trafficking for underpaying migrants," SYRACUSE POST-STANDARD (Nov. 18, 2010), available at http://www.syracuse.com/news/index.ssf/2010/11/ny_state_fair_vendor_is_accuse.html
- ²² *Morales-Ramirez v. International Personnel Resources*, 2:2010cv07031, (E.D. Pa., Filed December 2, 2010)
- ²³ *U.S. v. Farrell*, 563 F3d 364 (8th Cir. 2006)
- ²⁴ *Jimenez v. Vanderbilt Landscaping*, 2011 WL 3027190 (M.D. Tenn. 2011)