

Briefing Materials

Defending Hard-Fought H-2B Worker Protections from Attacks in the Appropriations Process

Tuesday, June 30th

The H-2B visa program provides businesses across the United States with qualified, temporary workers who serve an integral part of our nation's economy. As you may know, H-2B workers typically work in seasonal industries such as landscaping, construction, and golf course management, in addition to year-round industries like hospitality.

This past April, the Department of Labor and the Department of Homeland Security issued two joint interim final rules: one on H-2B wages and another mandating that employers seeking H-2B workers obtain certification that they have met certain program requirements. The rules also included critical new worker protections, such as the creation of a national registry of all H-2B job postings to help U.S. workers learn about available temporary jobs and the extension to H-2B workers of wage guarantees.

Unfortunately, while April's agency action was good news, these new rules are now under attack and face the possibility of being blocked via riders in the appropriations process. Without the new safeguards, H-2B visa holders, who already face the stark choice between staying with an employer or being deported, must remain in low-paying jobs with few protections, the equivalent of indentured servitude. Clearly, something must be done.

Moderator

Rachel Micah Jones, Executive Director of Centro de los Derechos del Migrante, Inc.

Panelists

Cathleen Caron, Executive Director of the Global Workers Justice Alliance

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H-2B Interim Final Rule: Basic Worker Protections

On April 29th, 2015, the Departments of Labor (DOL) and Homeland Security (DHS) published two new rules in the H-2B visa program that establish basic protections for both migrant and U.S. workers. Whereas the wage rule was final upon publication, the comprehensive rule was published as an interim final rule (IFR), effective immediately but subject to a 60-day notice-and-comment period that closed on June 29th.

Descended from the notorious Bracero Program, the H-2B program has been fraught with abuses since its inception.¹ In 2011, DOL and DHS promulgated rules that would have provided workers with basic protections. The 2011 rules, however, never took effect because of litigation and legislative hurdles. The 2015 H-2B IFR establishes the long-awaited basic protections for H-2B workers. New protections for migrant workers in the H-2B program include:

Terms of Employment. Employers must provide a copy of the job order containing terms of employment to each H-2B worker in a language the worker understands no later than when the worker applies for the visa. Workers often rely on false promises about the pay and work conditions in deciding to go to the U.S. Providing job orders to workers will help prevent fraud and misinformation.

Contractual Prohibition on International Labor Recruitment Fees. In their contracts with recruiters, employers must specifically prohibit recruiters from charging labor recruitment fees of workers. This prohibition will help prevent workers from going into debt in order to get a job.

Three-Fourths Guarantee. To prevent over-recruitment of workers, employers of H-2B workers will be required to pay them at least three-quarters of the hours promised in the work contracts. In the past, workers have been brought to the U.S. and then given little or no work, while paying high costs for housing and food.

Prohibition on Retaliation. H-2B employers are prohibited from retaliating against workers for filing complaints, consulting with workers' center or lawyers, and exercising any right or protection. This prohibition is a critical first step in bringing vulnerable workers out of the shadows so that they can stand up for their rights. Workers have a right to complain about unfair working conditions without fear of retaliatory firing, abuses, or deportation.

Reimbursements for Visa and Transportation Fees. Employers must pay or reimburse workers for inbound travel expenses after a worker completes 50 percent of the employment contract. Employers must also cover outbound travel expenses for migrants who work until the end of the job order or who are dismissed before the end of the job order. Reimbursing costs is fundamental to a work experience free of economic coercion.

¹ See Centro de los Derechos del Migrante, Inc., *Recruitment Revealed: Fundamental Flaws in the H-2 Temporary Worker Program and Recommendations for Change* (2013), available at http://www.cdmigrante.org/wp-content/uploads/2013/01/Recruitment-Revealed_Fundamental-Flaws-in-the-H-2-Temporary-Worker-Program-and-Recommendations-for-Change.pdf; see also Southern Poverty Law Center, *Close to Slavery: Guestworker Programs in the United States* (2007), available at <http://www.splcenter.org/publications/close-to-slavery-guestworker-programs-in-the-united-states/>.

SUMMARY OF H-2B REGULATIONS LITIGATION

January 2009 - DOL issues first comprehensive regulations for H-2B program, 73 Fed. Reg. 78,020

- *CATA v. Chao*, No. 09-240 (E.D. Pa. Jan. 18, 2009) - Workers and worker organizations challenge DOL's 2008 H-2B regulations issued under the Bush administration. In 2010, the court ruled for the plaintiffs and vacated/ remanded several portions of the regulations, including the H-2B wage rule.

January 2011 - DOL issues new H-2B Wage Rule, 76 Fed. Reg. 3452

- *Louisiana Forestry v. Solis*, No. 11-07687 (E.D. Pa. Sept. 7, 2011) - Employers challenge DOL's 2011 H-2B wage rule on the grounds that DOL does not have rule-making authority for the H-2B program. The district court ruled for DOL. On appeal, the Third Circuit Court of Appeals affirmed, ruling that DOL has authority to make rules for the H-2B program and that DOL's 2011 H-2B wage rule was validly promulgated. 745 F.3d 653 (3d Cir. 2014).
- *Bayou Lawn & Landscape Services v. Solis*, No. 11-0445 (N.D. Fla. Sept. 9, 2011) – *Bayou Lawn* raised identical issues with the wage rule as *Louisiana Forestry*. The case was dismissed once DOL issued a new wage rule in 2013.

April 2012 - DOL issues H-2B Comprehensive Rule, 77 Fed. Reg. 10,038

- *Bayou Lawn & Landscape Services v. Solis* (N.D. Fla. Apr. 16, 2012) – Employers challenge DOL's comprehensive 2012 H-2B regulations on the basis that DOL does not have rule-making authority for the H-2B program. The court agreed with the employers and permanently enjoined the 2012 rules. DOL appealed the ruling to the Eleventh Circuit Court of Appeals. The appeal is pending. DOL continued to operate the program under the 2008 rule, much of which was invalidated by the *CATA* court in 2010.

April 2013 – DOL and DHS issue Interim Final Wage Rule, 78 Fed. Reg. 24,047

- *CATA v. Perez*, No. 13-7213 (E.D. Pa. Dec. 11, 2013) and No. 14-2657 (E.D. Pa. May 8, 2014) – Workers and worker organizations file lawsuits related to DOL's implementation of higher wages issued for the 2013 seasons based on the 2013 IFR and DOL's continued acceptance of employer-provided surveys that use the Bush-era methodology invalidated by court order four years before. The court dismissed plaintiffs' suits on ripeness and standing grounds. Plaintiffs appealed both decisions to the Third Circuit Court of Appeals. The Third Circuit found for the plaintiffs on the wage survey appeal, ruling that DOL's decision to accept employer wage surveys was arbitrary and capricious in violation of the APA. 774 F.3d 173 (3d Cir. 2014).
- *Perez v. Perez*, No. 14-682 (N.D. Fla. Dec. 19, 2014) – U.S. worker files lawsuit to invalidate and enjoin the 2008 H-2B rule on the basis that, if DOL lacks rule-making authority to issue the 2012 rules, then the 2008 rules are similarly invalid. The court invalidated and enjoined the 2008 rules. DOL implemented a program hiatus while it created a new rule.

April 2015 – DOL/DHS issue Final H-2B Wage Rule, 80 Fed. Reg. 24,146, and a comprehensive Interim Final Rule, 80 Fed. Reg. 24,042

- *Bayou Lawn & Landscape Services v. Perez*, No. 15-00249 (N.D. Fla. June 1, 2015) – Employers sue DOL, DHS, and USCIS to enjoin the 2015 IFR primarily on the grounds that the agencies violated the APA by implementing the rule without notice and comment. The court denied employers' request for a temporary restraining order, but a preliminary injunction motion is still pending.
- *CATA v. Perez*, No. 15-04014 (D.N.J. June 12, 2015) - Workers and worker organizations challenge employer wage surveys and other aspects of the Final Wage Rule.



June 24, 2015

Dear Members of the Senate Appropriations Committee:

We, the International Labor Recruitment Working Group,¹ write to express our opposition to the rider attached to the Labor and Health and Human Services, Education, and Related Agencies appropriations bill. The rider includes legislative language that would seriously harm both U.S. and H-2B workers. The 2015 H-2B Interim Final Rule contains long-awaited, basic protections for U.S. and foreign workers, and these protections must be preserved.

The appropriations rider would drive wages down for both U.S. and foreign workers. In December 2014, the Third Circuit in *CATA v. Perez*² found that acceptance by the Dept. of Labor in 2013 and 2014 of employer wage surveys in the H-2B program had caused widespread depression of wages paid to workers. The rider will explicitly permit all such employer wage surveys to be used, resulting in lower pay for U.S. and H-2B workers alike.

The rider would pay foreign workers more than U.S. workers. The appropriations rider would deprive U.S. workers of the minimum prevailing wage rates required to be paid to H-2B workers.

The rider would destroy the basic guarantee that workers will get to work three-fourths of the hours promised to them. Workers deserve to at least work three-fourths of the time promised them over a 12-week period. The rider would deny them this guarantee of the promise on which they relied in taking the job.

The rider would deny jobs to U.S. workers. Whereas the Dept. of Labor regulations would define temporary employment as that which would normally involve no more than nine months in the year, the rider would bar the Dept. of Labor from restricting to positions that were truly seasonal. In effect, non-seasonal positions which could actually be filled by U.S. workers on a permanent basis would be made available to foreign workers.

We therefore urge you to oppose these provisions.

Sincerely,

The International Labor Recruitment Working Group

Membership:

AFL-CIO

American Federation of Teachers (AFT)

Janie Chuang and Jayesh Rathod from the American University, Washington College of Law

Centro de los Derechos del Migrante, Inc.

¹ The ILRWG is the first coordinated effort to strategically address abuses in international labor recruitment across visa categories. Formed in 2011, the ILRWG is comprised of organizations and academics working in many different industries and with internationally recruited workers from various visa categories.

² 774 F.3d 173, 185-196 (3d Cir. Dec. 5, 2014).

ILR INTERNATIONAL LABOR RECRUITMENT WORKING GROUP

Coalition to Abolish Slavery and Trafficking (CAST)
Department for Professional Employees (DPE)
Economic Policy Institute (EPI)
Farmworker Justice
Farm Labor Organizing Committee
Friends of Farmworkers
Jennifer Gordon from Fordham University School of Law
Patricia Pittman and Susan French from George Washington University
Global Workers Justice Alliance
National Domestic Workers Alliance
National Employment Law Project
National Guestworker Alliance, New Orleans Workers' Center for Racial Justice
Polaris
Safe Horizon
Service Employees International Union
Solidarity Center
Southern Poverty Law Center
UniteHere! International Union
Jennifer Hill from the University of Miami, School of Law
Verité

Jury Awards \$14 Million Verdict to Guest Workers Based on Signal International's Exploitation of H-2B Program's Loopholes

The H-2B program has had glaring loopholes in protections for foreign and U.S. workers. Recently announced Department of Labor regulations would close the worst of these gaps. A recent jury verdict against Signal International and its recruiters – fairly average companies, neither exemplary nor the worst – illustrates how inadequate H-2B program rules create incentives for companies to degrade pay rates and work terms while enjoying an uneven playing field.

In the aftermath of Hurricane Katrina, Signal recruited 590 Indian first-class welders and fitters through the H-2B program to perform marine fabrication work. In February 2015, a federal jury in New Orleans found Signal International guilty of fraud, trafficking, racketeering, and retaliation, amongst other claims. The jury awarded \$14.1 million to five H-2B workers – the first to reach trial of more than 200 H-2B workers with claims against Signal and its recruiters – for misuse of the H-2B system.

Fraudulent Recruitment, Lack of Transparency, and Recruitment Fees. The Indian recruiter and U.S. immigration attorney misrepresented the terms of the jobs and the visas to H-2B recruits, telling workers Signal would apply for green cards and failing to disclose Signal's \$1,065/month accommodations fee. They charged each worker \$10,000+ to get a job at Signal.

"Prevailing Wage" Set Far Below Market Wages. Although Signal demanded first class workers – most of whom had 10+ years' experience – DOL set prevailing wages fit for a first year apprentice. Under then-current four-tiered prevailing wage rules, DOL authorized Signal to pay each worker between \$12-14/hour. Market wages, however, were much higher than this "prevailing wage" rate. At trial, Signal executives testified that they could not keep a workforce at Signal's \$18.50/hour first class wage rate because competitors paid up to \$35/hour.

Retaliation. H-2B workers, who expected better treatment in America than Signal gave, sought to learn their workplace rights by meeting with lawyers. Signal found out about these meetings and fired the workers Signal believed had organized the meetings.

No Job Mobility Left Workers Stuck. H-2B jobs not being portable left the H-2B workers stuck at Signal. Signal executives testified at trial they knew H-2B workers could not leave, which allowed the company to increase its profits. Signal charged each worker \$1,065/month to live in a double-wide trailer with 23 other men. Signal underbid competitors on contracts based on having a below-market-wage workforce that could not leave.

The Southern Poverty Law Center (SPLC) has long fought to protect immigrant workers from workplace exploitation and other human rights abuses. The Center has represented thousands of guest workers whose lives have been devastated by unscrupulous employers. These workers have few options to hold employers accountable. The SPLC documented the abusive nature of the H-2 federal guest worker program for low-skill workers in its report Close to Slavery.

Economic Policy Institute

Research and Ideas for Shared Prosperity

FACTSHEET

The H-2B Temporary Foreign Worker Program: For labor shortages or cheap, temporary labor?

Rank	SOC code	Occupation	H-2B workers certified
1	37-3011	Landscaping and Groundskeeping Workers	34,845
2	45-4011	Forest and Conservation Workers	9,602
3	37-2012	Maids and Housekeeping Cleaners	6,060
4	39-3091	Amusement and Recreation Attendants	5,872
5	51-3022	Meat, Poultry, and Fish Cutters and Trimmers	3,424
6	47-2061	Construction Laborers	2,910
7	27-2022	Coaches and Scouts	1,808
8	35-3031	Waiters and Waitresses	1,700
9	39-2021	Nonfarm Animal Caretakers	1,516
10	51-9198	Helpers--Production Workers	1,501

Source: Office of Foreign Labor Certification, U.S. Department of Labor, http://www.foreignlaborcert.doleta.gov/pdf/H-2B_Selected_Statistics_FY2014_Q4.pdf

- **H-2B has become a de facto landscaping visa**
 - Landscaping occupations have been the top H-2B occupation for the past decade.
 - In 2014, 37% of H-2B certifications were for "Landscaping and Groundskeeping Workers."

WAGES DECLINING OR STAGNANT IN TOP 10 H-2B OCCUPATIONS

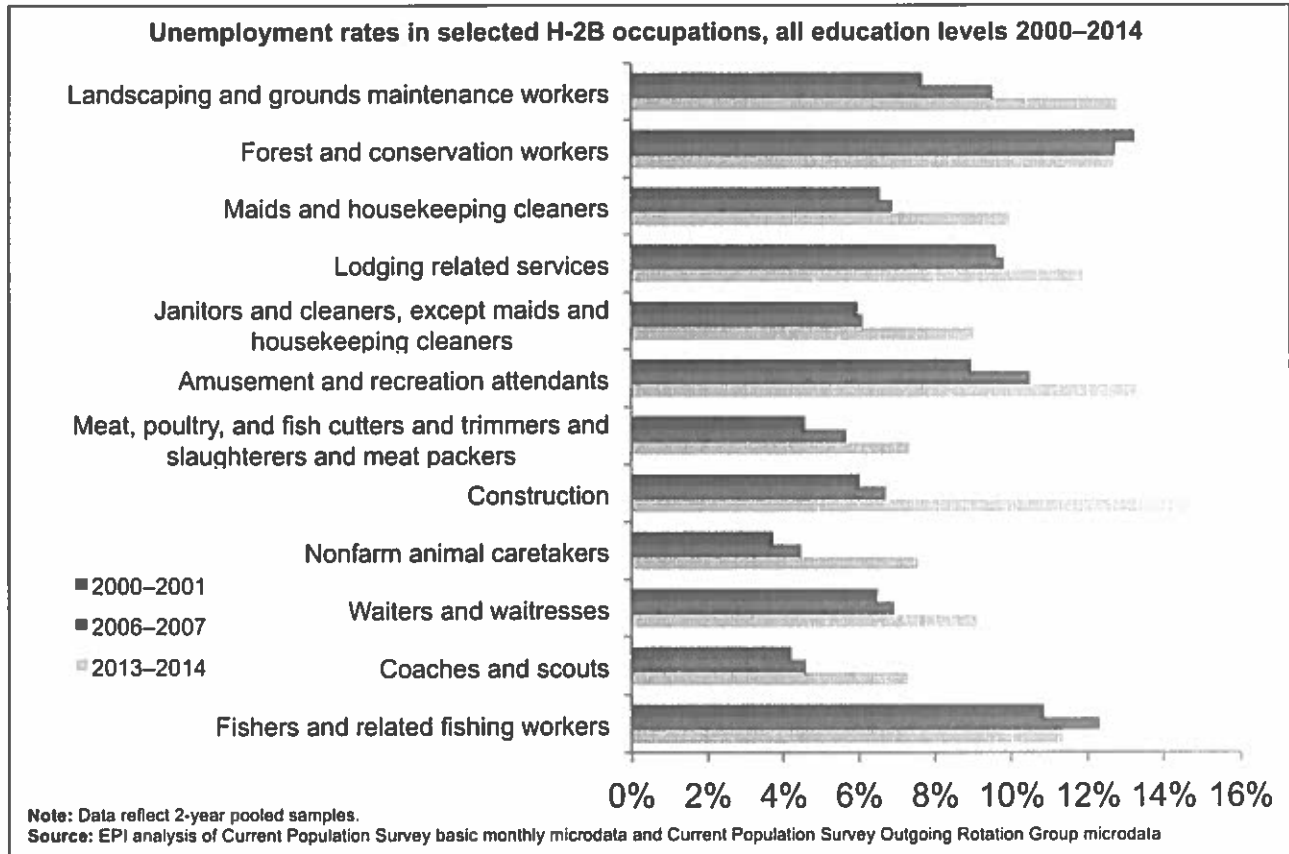
- **No wage growth in top 10 H-2B occupations**
 - The only occupation where wages rose slightly was "Waiters and Waitresses"; workers in that occupation saw their wages increase by \$0.59 over the 2003-2014 period, an insignificant amount.
 - All other workers in top 10 H-2B occupations are worse off than they were 11 years ago.

Rank	SOC code	Occupation	H-2B workers certified	2003	2014	2003-2014 real change in 2014 dollars*	2003-2014 percentage change*
1	37-3011	Landscaping and Groundskeeping Workers	34,845	\$13.44	\$12.84	-\$0.59	-4.4%
2	45-4011	Forest and Conservation Workers	9,602	\$14.53	\$14.24	-\$0.29	-2.0%
3	37-2012	Maids and Housekeeping Cleaners	6,060	\$10.89	\$10.81	-\$0.07	-0.7%
4	39-3091	Amusement and Recreation Attendants	5,872	\$10.20	\$9.90	-\$0.31	-3.0%
5	51-3022	Meat, Poultry, and Fish Cutters and Trimmers	3,424	\$11.86	\$11.62	-\$0.23	-2.0%
6	47-2061	Construction Laborers	2,910	\$17.64	\$17.18	-\$0.46	-2.6%
7	27-2022	Coaches and Scouts	1,808	\$20.87	\$18.81	-\$2.06	-9.9%
8	35-3031	Waiters and Waitresses	1,700	\$9.80	\$10.40	\$0.59	6.1%
9	39-2021	Nonfarm Animal Caretakers	1,516	\$11.74	\$11.03	-\$0.71	-6.0%
10	51-9198	Helpers--Production Workers	1,501	\$13.05	\$12.30	-\$0.74	-5.7%

Note: All values are adjusted to 2014 dollars. *Where OES data did not provide an hourly rate, we estimated an hourly wage by dividing the reported average annual salary by 2080 hours (52 weeks*40 hours).
Source: EPI analysis of Occupational Employment Statistics survey data, U.S. Department of Labor; Office of Foreign Labor Certification, U.S. Department of Labor.

PERSISTENT HIGH UNEMPLOYMENT IN TOP H-2B OCCUPATIONS SINCE 2000

- **All of the top 10 H-2B occupations have much higher unemployment rates than the national average.**
 - Landscaping—the top H-2B occupation—averaged a 12.8% unemployment rate during 2013 and 2014.
 - Since 2000, unemployment has only decreased slightly in one of the top H-2B occupations.



2008 BUSH WAGE REGULATION UNDERCUT THE WAGES OF U.S. WORKERS

- **In FY 2013, the average wages paid to H-2B workers in the top eight H-2B occupations were substantially lower than the overall average wage in each occupation (top eight accounted for 74% of all H-2B certifications that year). This gives employers a financial incentive to hire H-2B instead of U.S. workers.**
 - Nationwide in landscaping, on average, employers paid H-2B workers \$3.37 less per hour than the average paid to all workers employed in landscaping in the United States.

National rank	SOC CODE	Occupation title	H-2B workers certified	H-2B Average Hourly Wage	OES Average Hourly wage, all workers	Employer hourly wage savings
1	37-3011	Landscaping and Groundskeeping Workers	31,287	\$9.28	\$12.65	\$3.37
2	45-4011	Forest and Conservation Workers	9,573	\$10.52	\$13.88	\$3.36
3	39-3091	Amusement and Recreation Attendants	5,788	\$8.30	\$9.76	\$1.46
4	37-2012	Maids and Housekeeping Cleaners	5,626	\$9.07	\$10.64	\$1.57
5	51-3022	Meat, Poultry, and Fish Cutters and Trimmers	3,051	\$8.09	\$11.47	\$3.38
6	47-2061	Construction Laborers	2,106	\$10.45	\$16.84	\$6.39
7	39-2021	Nonfarm Animal Caretakers	1,639	\$10.29	\$10.82	\$0.53
8	35-3031	Waiters and Waitresses	1,566	\$9.90	\$10.04	\$0.14

Note: All values in 2013 dollars.
Source: EPI analysis of Occupational Employment Statistics survey data, U.S. Department of Labor; Office of Foreign Labor Certification, U.S. Department of Labor.

GuestworkerData.org



Guestworker programs allow U.S. employers to hire foreign workers on a temporary basis. Despite their prominence, the U.S. government has published limited information about how employers use nonimmigrant visa programs. To solve for the current lack of transparency, **GuestworkerData.org** presents new, interactive state-by-state analysis of which employers use the H-1B, H-2B, and H-2A guestworker programs and where they are located.

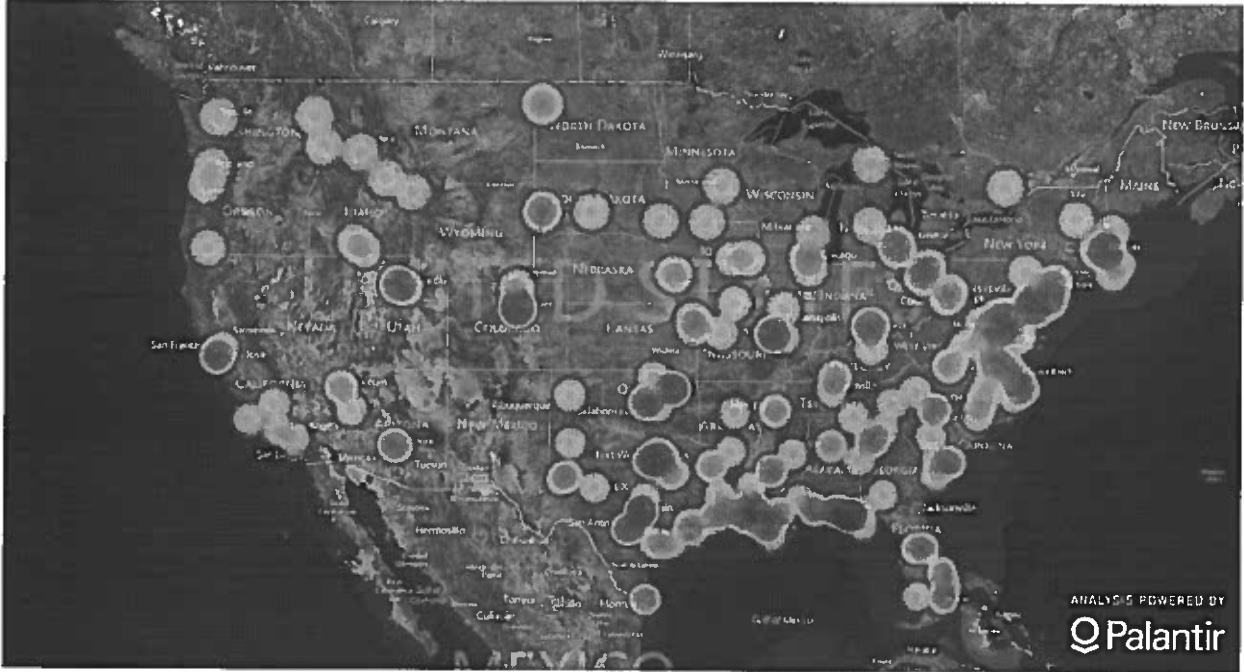
Information includes:

- Facts at a glance for all 50 states
- Number of H-1B, H-2B, and H-2A workers petitioned for by state's businesses
- Each state's top H-1B, H-2B, and H-2A petitioners
- Each state's top H-1B and H-2B occupations
- Additional key findings including detailed fact sheets



Human Trafficking & Labor Exploitation Cases Involving H2-B Visa Holders

Since December 2007, the National Human Trafficking Resource Center (NHTRC) hotline, operated by Polaris, has received thousands of calls from H2-B visa holders in distress. More than **1,460** of these **situations involved reports of severe labor exploitation**. Most concerning, **more than 160 of the situations involved indicators of human trafficking and forced labor**. Reported abuses include: employers withholding passports and wages; outstanding debts to recruiters and other employer agents; threats or actual physical harm if one attempted to leave; and, severely limited freedom of movement. The industries most frequently cited by callers include: landscaping, agriculture, traveling carnivals, and hospitality.



Map of the location of callers who reported situations of labor exploitation or labor trafficking involving H2-B visa holders to the NHTRC in 2014. In some situations, the location of the caller was not disclosed. Note, this map shows the location of the caller at the time the call was placed, not necessarily the location of case. In 2014, there were no callers in HI or AK reporting these types of situations.

In 2014 alone, the National Human Trafficking Resource Center handled 485 cases involving H2-B visa holders experiencing abusive labor conditions.

Of these cases:

- **60 cases involved indicators of human trafficking and H-2B visas**
- **366 cases involved indicators of labor exploitation and H-2B visas**

Polaris is a leading non-profit organization in the global fight against all forms of human trafficking and modern day slavery. Polaris became aware of the problems faced by H2-B holders through numerous calls by H2-B visa holders into the NHTRC, a hotline operated by Polaris and partially funded by the U.S. Department of Health and Human Services. The NHTRC is a national, anti-trafficking hotline and resource center serving victims and survivors of human trafficking and the anti-trafficking community across the United States. The toll-free hotline is available to answer calls from anywhere in the country, 24 hours a day, 7 days a week, every day of the year in more than 200 languages. People can receive help, report a tip, or request information or training by calling the NHTRC at 1-888-373-7888 or by sending a text to BeFree (233733).

**Note: The data displayed here was generated based on information communicated to the NHTRC hotline. The NHTRC cannot verify the veracity of the information reported. This is not a comprehensive report on the scale or scope of human trafficking within a particular location, venue, or industry. These statistics may be subject to change as additional information is received.*