Side by side comparison of 2015 DOL H-2B regulations and proposed language of H-2B bill

I. General Information		
Issue/Provision	**2015 Regulations**	**Proposed Language S.2225[1]**
Effective Dates	For Applications for Temporary Employment Certification (the "Application"), ETA Form 9142B, filed on or after the date of publication (April 29, 2015), with transition procedures for employers with start dates of need prior to October 1, 2015. The Registration provision will be implemented through a future Federal Register announcement.	Effective as if enacted on January 1, 2015.
Agency in charge	Department of Labor conducts labor certification test. Department of Homeland Security reviews I-129 Petition for visas. Department of State conducts consular interviews and issues visas.	Department of Homeland Security ("DHS") reviews labor attestation application and grants petition for visas. Prohibits DHS from delegating authority outside of DHS. Department of State conducts consular interviews and issues visas.
Application Process/Labor Market Test	*Labor Certification Process* Employer submits and receives a prevailing wage determination and then submits an H-2B Registration (after the transition period), from which ETA certifies temporary need for up to three years. Each season, employer submits an Application, ETA Form 9142B, a copy of the job order, and additional documentation from which ETA assesses the employer's job	*Labor Attestation* A petition stating (i) the employer's need for labor and the occupations sought, (ii) the number of named and unnamed H-2B workers sought; (iii) the area of employment and worksites, which may be a projected itinerary; (iv) anticipated beginning and ending dates and an indication whether actual entry or departure will be staggered; (v) a disclosure of terms and

[1] A bill to amend the Immigration and Nationality Act to establish an H-2B temporary non-agricultural work visa program and for other purposes, S.2225 was introduced by Senator Thom Tillis (R-NC) on October 30, 2015. As of November 3, 2015 cosponsors include Senators Barbara Mikulski (D-MD), Bill Cassidy (R-LA), Mark Warner (D-VA).

	opportunity and then orders recruitment to ensure a thorough test of the labor market. The Application, ETA Form 9142B, and required documents must be submitted 75 - 90 calendar days before the employer's date of need.	conditions of employment to be given to potential H-2B workers; and (vi) an attestation that the employer (a) unsuccessfully sought U.S. workers, (b) did not charge prohibited recruitment fees and contractually prohibited its agents from charging such fees, (c) the employer will not layoff a U.S. worker in the 30 days before the start date of need in the location and occupation for which H-2B workers are sought, and (d) the "specific" job for which the petition seeks workers is not vacant due to strike or a lock out.
Temporary Need	Except for one-time need, temporary need (i.e., seasonal, peakload and intermittent need) is limited to 9 months or less. 20 CFR 655.6	One time need lasting no longer than three years. Peak load or intermittent need of no more than one year. Seasonal need of not more than 10 months.
Job Contractors	Participation of job contractors is limited to those with their own genuine temporary need for workers on a temporary seasonal or one-time occurrence basis. The job contractor and its clients, the end-employers, must continue to declare joint employment, and both must continue to sign Appendix B agreeing to comply with the H-2B terms and conditions.	No provision (no limitation on role of job contractors).
Corresponding employment	Corresponding workers are generally defined as non-H-2B workers who perform either substantially the same work included in the job order or substantially the same work performed by the H-2B workers, with exclusions for certain long-term incumbent workers and certain workers with a Collective Bargaining Agreement or individual employment contract. Corresponding workers are entitled to the same rights	Phrase "corresponding employment" is not used. Bill prohibits displacing a U.S. worker from a job that is "essentially equivalent" to the job to be performed by an H-2B worker. "Essentially equivalent" is work that (1) involves "the same essential responsibilities"; (2) is held by a U.S. worker with "substantially equivalent qualifications and experience"; **and** (3) is located in the same area of employment.

	and benefits as H-2B workers. Defined at 29 CFR 503.4; enforcement identified at 29 CFR 503.15.	U.S. workers defined as (i) U.S. nationals, (ii) legal permanent residents, (iii) refugees, (iv) asylees, or (v) "an immigrant otherwise authorized to be employed under this Act." DHS may not reduce the number of H-2B visas an employer receives due to the employer hiring a U.S. worker prior to the date of need.
Timing of recruitment in relation to Application	Employer completes required recruitment after filing the Application, and must demonstrate – not merely attest – that it was unable to locate sufficient number of U.S. workers. Employer must submit recruitment report to ETA after filing, according to instructions from the Certifying Officer. State Workforce Agency (SWA) job posting and Department's electronic job registry job posting stay active and employers must continue to accept U.S. applicants until 21 days before the date of need.	Employer attests that it completed required recruiting before submitting the application. Employer also attests it was unable to locate sufficient numbers of qualified U.S. workers.
Definition of full-time	35 hours or more per week. 20 CFR 655.5, 29 CFR 503.4	30 hours or more per week.
Disclosure of foreign recruitment	When filing an Application, the employer and its agents and attorneys must provide copies of any agreements with recruiters engaged in recruiting H-2B workers. In addition, the employer and its agent and attorney must provide the names and locations of sub-contractors hired by the recruiter who will recruit H-2B workers. The employer must continue to contractually prohibit recruiters from seeking or	No provision.

	receiving fees from prospective workers. 20 CFR 655.9	
Timing of acceptance of petitions	1. **New employers must register** - 150-120 calendar days before the date of need will be required. (This process has not yet been implemented.) 2. **Obtain a Prevailing Wage Determination (PWD) - at least** 60 calendar days before it is needed from the National Prevailing Wage Center (NPWC). 3. **File a job order and H-2B application** - 90 to 75 days prior to the date of need. File a job order with the State Workforce Agency (SWA) **AND** Submit the H-2B application (ETA Form 9142B) with supporting documents and a copy of the job order filed with the SWA to the Chicago National Processing Center (Chicago NPC). 4. **Once labor certification is received, employers file the** I-129 Petition to USCIS	Within 15 business days of an employer filing of an H-2B petition (and within 5 business days of an employer filing a premium processing petition), DHS shall (i) accept the petition if DHS has determined that (a) the employer's labor need is temporary; (b) the number of workers requested is justified; (c) the employer has made the attestations required under this bill; and (d) the employer has complied with the INA and this bill; (ii) inform the petitioner of DHS's decision; and (iii) if the petition is accepted, inform the relevant U.S. consulate. If the H-2B cap has been reached, DHS will issue conditional approvals. DHS and the Department of State will confer to determine when conditional approvals may turn into final approvals.
Coordination between DHS and State		DHS and State will set up an electronic notification system such that DHS notifies State within 48 hours of approval of an H-2B petition. The State Department will submit a weekly report to DHS of H-2B visas issued.
Re-certification / Replacement workers	In the event that a U.S. worker does not report for employment or abandons the job before the end of the job order, the employer can request from ETA an expedited re-certification in order to gain approval to hire H-2B workers. The Certifying Officer must first determine that no replacement U.S. workers are available. Additional recruitment of U.S. workers is	An employer may hire a replacement H-2B worker who does not count against the H-2B cap if a position opens because an H-2B worker did not arrive or left before the end of the job need.

	not required. 20 CFR 655.57	
Returning workers	No provision	Returning workers would not count against the H-2B cap unless that worker (i) left the US for longer than a year or (ii) has not been counted against the cap for three years. The State Department may waive in-person interviews for returning workers.
Transparency	Every year, DOL publishes information on the H-2B applications for labor certification that it receives on a publicly available website, which includes the names and addresses of employers (or their agents) who are seeking to hire H-2B workers and certifying they cannot find U.S. workers for those jobs. Included as well are the number of H-2B workers certified to work for each employer (and/or denied), the work state, the specific occupation (by standard occupational code), and the wages employers have promised to pay H-2B workers if they are allowed to hire them.	DHS shall make publically available on the DHS website, and weekly update, information including (i) five years of H-2B petitions received and approved and the number of H-2B workers no subject to the H-2B cap; (ii) the annual target number of beneficiaries to be issued H-2B visas for the fiscal year; (iii) the number of H-2B visas approved; (iv) the number of petitions pending; (v) the number of visas not exempt from the H-2B cap; (vi) the methodology and raw data used to determine whether the H-2B cap has been reached; and (vii) the number of petitions conditionally approved and the aggregate number of beneficiaries in the conditionally approved petitions.
GAO Study		Within six months of DHS issuing H-2B regulations, the GAO will publish a report describing the accuracy of the methodology used to determine the H-2B cap is met and the accuracy of such methodology. Within four years of the enactment of this bill, the GAO shall submit to Congress an assessment of this bill's returning worker provisions on the domestic

		workforce, including any relationship between an increase of H-2B workers and changes in domestic employment or earnings.

II. Conditions of Employment		
Issue/Provision	**2015 Regulations**	**Proposed Language**
Disclosure	Employers must disclose the job order to all H-2B and corresponding workers; must be in a language understood by the workers, as necessary or reasonable. 20 CFR 655.20(l), 29 CFR 503.16(l)	Employers will disclose the terms and conditions of employment, including individualized entry and departure dates, to H-2B job candidates by the consular interview date. No provision about disclosure being in a language understood by the workers.
Offered wage	Offered wage equals or exceeds the highest of the prevailing wage or Federal, State, or local minimum wage, and must be paid for the entire employment period certified in the Application. Employer must pay at least the offered wage free-and-clear, either in cash or in a negotiable instrument payable at par. 20 CFR 655.20(a) & (b), 29 CFR 503.16(a) & (b)	Offered wage equals or exceeds the highest of the wages paid by the employer to other employees with similar qualifications, the Federal, State, or local minimum wage, or the prevailing wage. Unless controlled by a collective bargaining agreement signed by the employer or a required wage for governmental projects, the prevailing wage will be either (1) commensurate with Bureau of Labor Statistics data (i.e., the 2009 Bush wage rule with four skill levels for each job, the lowest of which allows employer to choose to payH-2B workers the 17th percentile wage) or (2) set by a private wage survey. Private wage surveys may use data no older than two years old, may use similar job descriptions, may reach

		across industry, may average the wages received or take the median wage, and must use a statistically valid methodology to collect date.
Employer provided items	Employer must provide, without charge or deposit, all tools, supplies, and equipment needed to perform the job. 20 CFR 655.20(k), 29 CFR 503.16(k)	No provision requiring employers to provide tools and equipment to perform the job.
Three-fourths guarantee	Employer must guarantee to offer employment for a total number of work hours equal to at least three-fourths of the workdays in every 12-week period (or, for job orders lasting less than 120 days, every 6-week period). 20 CFR 655.20(f), 29 CFR 503.16(f)	No provision; bill does not require employers to provide H-2B workers with a minimum number of work hours.
Earnings statements	Employer must keep accurate pay and hours records and supply workers with earnings statement on or before each payday. 20 CFR 655.20(i), 29 CFR 503.16(i)	No provision; bill does not require employers to provide H-2B workers with earnings records.
Job opportunity and full-time threshold	Job opportunity is a bona fide, full-time temporary position. Full time defined as 35 or more hours per week. Workweek is defined as a regularly recurring period of 168 hours (seven consecutive 24-hour days). 20 CFR 655.5 (full-time definition) & .20(d) (condition). 29 CFR 503.4 (full-time definition) & .16(d) (condition)	Full time is 30 hours or more per week. If a state or industry practice defines full time work as less than 30 hours per week, however, "full time" is the number of hours set by the state or industry.

No strike or lockout	There may not be any strike or lockout in any of the employer's worksites within the area of intended employment. 20 CFR 655.20(u), 29 CFR 503.16(u)	H-2B job may not be vacant because former occupants are on strike or locked out.
Required recruiting	Employers must conduct required recruiting. No discrimination in hiring; rejections are only for lawful, job-related reasons; employer must maintain and submit a recruitment report, indicating the source, name, and disposition of each worker, along with the lawful reasons for any rejections. 20 CFR 655.20(r) & (s), 29 CFR 503.16(r) & (s).	Employers must conduct required recruiting.
Required recruiting activities	Required recruiting includes: -- SWA job posting **until 21 days before the date of need** -- newspaper ad on 2 days (one a Sunday) -- the call-back of, and offer of re-employment to, former U.S. workers (including workers who were laid off) from the previous year -- contacting the bargaining representative OR (if there is no bargaining representative) posting the job for 15 business days at 2 conspicuous locations at every place of employment -- other recruiting activities directed by Certifying Officer. The SWA performs two additional activities: -- contacts the union, where the occupation or industry is customarily unionized	Required recruiting includes: -- SWA job posting on Department of Labor electronic job registry for 45 days starting no later than 60 days before the date the employer intends to hire an H-2B worker.

	-- sends the job order to DOL for posting on the national job registry. 20 CFR 655.20-.48 and 29 CFR 503.16(t)	
No layoffs	Employer has not and will not lay off any similarly employed U.S. worker in the occupation and the area of intended employment during the period from 120 days before the first date of need through the end of the period of employment. Layoffs for lawful, job-related reasons (such as lack of work or the end of a season) are not disqualifying if all H-2B workers are laid off before corresponding U.S. workers. 20 CFR 655.20(v), 29 CFR 503.16(v)	Layoffs of U.S. workers allowed during period of need for H-2B workers if for cause, inadequate performance, violation of workplace rules, voluntary departure, voluntary retirement, or the expiration of a grant or contract. It would not be a "layoff" to end a U.S. worker's employment if that worker is offered similar employment with the same employer for the same or higher benefits – although potentially at a different location.
No preferential treatment of H-2B workers	The offered terms and conditions are not less favorable than those offered to H-2B workers. Employers may not impose on U.S. workers restrictions or obligations not imposed on H-2Bs. 20 CFR 655.20(q), 29 CFR 503.16(q)	The benefits, wages, and working conditions offered to U.S. workers would be not less than those offered to H-2B workers. Employers may not impose on U.S. workers restrictions or obligations not imposed on H-2Bs.
Housing	Any housing provided must be disclosed on the job order and made available to U.S. workers as well as H-2B workers.	An employer is not required to provide housing, a housing allowance, or other facilities to an H-2B worker. If an employer provides housing, a housing allowance, or other facilities to an H-2B worker, the employer may deduct from wages the fair value of the housing or other facility.
Prohibited fees	Employer and its agent, attorney, and employees may	Employer has not collected and will not collect any

	not seek or receive payment (including, but not limited to, monetary payments, wage concessions, kickbacks, bribes, etc.) for any costs associated with the certification or employment, including attorney/agent fees, application costs, DHS Petition fees, recruitment fees. 20 CFR 655.20(o), 29 CFR 503.16(o)	payment as a condition of H-2B employment other than passport, visa, or inspection fees, or other expenses for which reimbursement is not prohibited by the Fair Labor Standards Act ("FLSA").
Contracts with recruiters	Employer must contractually prohibit **agents and recruiters (and any agent or employee of those agents and recruiters)** whom the employer engages **directly or indirectly** in recruitment of H-2B workers from seeking or receiving fees from prospective workers. 20 CFR 655.20(p), 29 CFR 503.16(p)	Employer must contractually prohibit agents, attorneys, facilitators, recruiters, or similar service providers from collecting fees as a condition of H-2B employment. If the employer learns or has reason to know that its agents have been paid fees as a condition of H-2B employment, the employer will reimburse the fees.
Transportation and Subsistence Expenses	Employer is liable under H-2B for reasonable cost of 1) inbound travel, including related daily subsistence expenses, for workers who complete 50% of the job order, and 2) outbound travel, including related daily subsistence expenses, for workers who work until the end of the job order or are dismissed early. In addition, if worker is entitled to Federal minimum wage, then the FLSA generally requires reimbursement of inbound costs in the first workweek. All transportation provided by the employer must comply with applicable Federal, State, and local laws and regulations.	Employer is liable for most economical cost of (i) inbound transportation, including documented and reasonable subsistence costs, from U.S. consulate or previous worksite, for workers who complete 50% of the job order, and (i) outbound travel for workers who work to the end of the job period and are not traveling to another job in the U.S., to the U.S. consulate that issued the visa including reasonable subsistence expenses. Employers have no obligation to reimburse the cost of transportation to or from a worker's home and the consulate.

	20 CFR 655.20(j), 29 CFR 503.16(j)	
Primary Benefit		The benefits and wages provided to an H-2B worker, the labor and services provided to an H-2B employer, the job opportunities to H-2B workers, and other terms and conditions of employment of H-2B workers are not for the primary benefit of either the H-2B worker or the employer but are for the equal mutual benefit of both.
Staggered crossings	No provision in DOL regulations, but allowed under continuing resolution.	An employer may bring in H-2B workers during the 120 days following the employment start date. If bringing in H-2B workers between the 91st to 120th dates after the start date, the employer must (i) publish notice of the job offer (a) at the job site; (b) in a local paper on two Sundays; and (c) on DOL's electronic job registry and (ii) hire any U.S. worker who is equally or better qualified for the job. DOL shall not consider staggered crossings to violate law.
Visa and visa-related expenses	Employer is required to pay or reimburse in the first workweek the full cost of visa and visa-related expenses. 20 CFR 655.20(j), 29 CFR 503.16(j)	Employer is not obligated to pay or reimburse the costs of passport, visa, or inspection fees.
No unfair treatment	The employer has not and will not (and has not and will not cause another person to) intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any person who, with respect to 8 U.S.C. 1184(c), 20 CFR Part 655, Subpart A, 29 CFR Part 503, or any other regulation	No protections for workers against retaliation.

	promulgated thereunder: has filed a complaint; instituted or caused to be instituted any proceeding; testified or is about to testify; consulted with a workers' center, community organization, labor union, legal assistance program or attorney; or exercised or asserted on behalf of himself/herself any right or protection. 20 CFR 655.20(n), 29 CFR 503.16(n)	
DHS/ETA notification of early separation	Employers must notify USCIS and ETA within two workdays of an H-2B worker who separates before the end of the certified period of employment. Employers must notify ETA within two workdays of any corresponding worker who separates before the end of the period of employment. --if separation is due to voluntary abandonment by the worker and proper notification is made, the employer will not be responsible for return transportation and the worker will not be entitled to the three-fourths guarantee beyond the last, full 12- or 6-week period before abandonment; --if separation is due to dismissal for cause and proper notification is made, the employer will not be liable for the three-fourths guarantee beyond the last, full 12- or 6-week period before termination. 20 CFR 655.20(y), 29 CFR 503.16(y)	Employer shall notify DHS within two work days (i) of an H-2B worker who failed to report for work within five work days of the state date; (ii) if the labor for which the H-2B worker was hired is completed more than 30 days early; or (iii) of an H-2B worker for failed to report for work for five days without employer consent.
Compliance with other	During the period of employment, employers must comply with all other employment-related laws,	No protections.

employment-related laws	including employment-related health and safety laws. 2015 rule also adds a prohibition against the employer and its agents knowingly confiscating, destroying, or holding immigration documents. 20 CFR 655.20(z), 29 CFR 503.16(z)	

III. Remedies		
Issue/Provision	**2015 Regulations**	**Proposed Language**
Revocation	ETA may revoke a labor certification for a variety of reasons, including fraud; willful misrepresentation of a material fact; substantial failure of a term or condition of employment; failure to cooperate with DOL investigation; or failure to comply with DOL remedies, sanctions, or decisions. 20 CFR 655.72	No provision.
Civil Money Penalties	Up to $10,000 per violation. What constitutes a violation: "Each such violation involving the failure to pay an individual worker properly or to honor the terms or conditions of a worker's employment required by the H-2B Registration, Application for Prevailing Wage Determination, Application for Temporary Employment Certification, or H-2B Petition, constitutes a separate violation." CMPs are	No provision.

	equal to back wages subject to the $10,000 cap for violations related to H-2B wages, prohibited fees, and improper deductions. CMPs are equal to wage assessments for U.S. workers who were improperly laid off or not hired or rehired. Highest penalties are reserved for violations that involve harm to U.S. workers. 29 CFR 503.23	
Debarment	WHD does have independent debarment authority to debar employers, agents, and attorneys. Debarment extends to all other labor certifications (other visa programs) with DOL. Offenses which may be cause for debarment are broader than in 2008 regulations. Debarment period: between 1 and 5 years. 29 CFR 503.24	No provision.
Other remedies	Include back wages, enforcement of provisions of the job order, make-whole relief for any person discriminated against, and make-whole relief, including instatement/reinstatement for U.S. workers improperly laid off or not hired/rehired, or other actions deemed appropriate. 29 CFR 503.20	No provision.