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Leaving It Up to Chance: Problems with the H-2B Statutory Cap on Visas

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Leaving It Up to Chance: Problems with the H-2B Statutory Cap on Visas

*Heidi B. Bieber**

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INTRODUCTION

Earl Fontenot owns a crawfish-processing plant in a small town in south Louisiana.¹ Production in crawfish-processing plants only lasts for a few short months and consists of long work hours. Some workers peel crawfish all day long to obtain meat from the tails, while others package the meat into one-pound bags, seal the bags, and place them in large industrial freezers. Those who work in a crawfish plant diligently peel and package hundreds of thousands of pounds of crawfish meat. This work is far from glamorous, and the description of this job is often unappealing to domestic workers who want permanent jobs.

Year after year, Fontenot advertises in an effort to find people willing to work a few months out of the year in his crawfish plant. However, Fontenot has difficulty finding enough U.S. workers to keep his business alive. To fill his need for workers, Fontenot turns to the H-2B temporary-foreign-worker program² in hopes of finding foreign workers. In July

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* J.D./D.C.L. candidate 2022, Paul M. Hebert Law Center, Louisiana State University. I would like to thank my parents, Kody and Shelly Bieber, for showing me endless love and support in all of my endeavors. I also want to thank those who contributed to this Comment in their own way, from editors to friends and loved ones.

1. The facts in this hypothetical are very loosely based on the experience of an agricultural farmer in Louisiana who owns a crawfish-processing plant.

2. Temporary-foreign-worker programs allow U.S. employers to seek workers from foreign countries when they are unable to find domestic workers. *See* ANDORRA BRUNO, CONG. RSCH. SERV., R44849, H-2A AND H-2B

2016, Fontenot applied for seasonal H-2B workers to travel from outside the United States to Louisiana in order to work from February through June 2017. However, before Fontenot finished the application process, the United States Citizen and Immigration Service stopped processing petitions for H-2B workers because it had already issued the set amount of visas allowed for the upcoming year's first split.³ Fontenot had to resubmit his petitions, requesting workers for a start date in April that would count against the cap of visas for the second split of the fiscal year. Instead of starting production in February, he could not start until April after his H-2B workers arrived. Additionally, the local employees he hired to oversee the peeling production were out of work until April. Due to the seasonal nature of harvesting crawfish, Fontenot could not make up for the work lost from February to April. Fontenot's business suffered a substantial loss of profits because he went months during his seasonal work period without workers to peel and package his crawfish meat. Similar labor deficiencies caused by the unavailability of both domestic and foreign workers affect many seasonal businesses across the United States each year.⁴ The unavailability of workers has caused and is still causing a number of problems to the country's economy, including the closure of seasonal businesses, the loss of American jobs, and the limited production of goods and services in multiple industries.

Temporary-foreign-worker programs allow United States employers to hire foreign workers when American workers are not available.⁵ Many discussions, debates, and controversies concerning temporary-foreign-worker programs have arisen since the formal enactment of these programs by the Immigration and Nationality Act (INA) of 1952.⁶ One particular controversy with foreign-worker programs is associated with the

TEMPORARY WORKER VISAS: POLICY AND RELATED ISSUES (2020) [hereinafter BRUNO, H-2A AND H-2B].

3. The first half of the fiscal year is October 1st to March 31st and the second half is April 1st to September 30th. *See* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 214(g)(10), 66 Stat. 163.

4. *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-20-230, H-2B VISAS: ADDITIONAL STEPS NEEDED TO MEET EMPLOYERS' HIRING NEEDS AND PROTECT U.S. WORKERS (2020).

5. *See* BRUNO, H-2A AND H-2B, *supra* note 2.

6. *See generally* Claire Felter, *U.S. Temporary Foreign Worker Visa Programs*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/backgrounders/us-temporary-foreign-worker-visa-programs> [<https://perma.cc/86FS-JTBA>] (last updated July 7, 2020).

H-2B program.⁷ The H-2B program sets a quota for annual visas, which is known as the cap.⁸ The cap is currently 66,000 visas.⁹ Over the past several years, the demand for H-2B workers has greatly increased, outweighing the supply of available visas.¹⁰ Due to high demand and low supply of visas, many U.S. employers do not receive the H-2B workers for whom they apply, or they receive the workers at a later work date than requested.¹¹ In turn, businesses suffer significant harm due to the shortage of workers, with some businesses even completely closing down.¹² Despite Congress's and federal agencies' efforts to provide relief to U.S. businesses, the demand for H-2B workers has continued to rise while the cap has not changed.¹³

In an attempt to provide relief to U.S. employers seeking H-2B workers, Congress and federal agencies have enacted temporary provisions that increase the number of H-2B visas.¹⁴ Nevertheless, a permanent change to the H-2B statutory cap will provide a better solution for allowing additional H-2B visas. Temporary provisions create uncertainty for U.S. employers seeking H-2B workers because employers cannot be sure that there will be new provisions for relief each year.¹⁵ The H-2B program needs a permanent provision that strikes a balance between providing relief to U.S. employers and preventing an uncontrollable increase in the issuance of H-2B visas. Congress should amend the INA to adopt a returning-worker-exemption provision that provides an opportunity for returning H-2B workers to be exempt from the cap under certain circumstances and for a limited period of time. This proposal builds off of previous Congressional and administrative temporary provisions and benefits employers that have a continuous need for H-2B workers.

Part I of this Comment will provide a broad overview of the temporary-foreign-worker programs in the United States and a more specific review of the H-2B temporary-foreign-worker program. It will also review the history of legislative changes to the H-2B cap. Part II will identify the issue with the statutory cap and explain how the low supply of H-2B visas has hurt businesses across the United States. Part III will

7. *See generally* ANDORRA BRUNO, CONG. RSCH. SERV., R44306, THE H-2B VISA AND THE STATUTORY CAP (2020) [hereinafter BRUNO, THE H-2B VISA].

8. Immigration and Nationality Act of 1952 § 214(g)(1)(B).

9. *See id.*

10. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 4.

11. *See id.*

12. *See id.*

13. *See* BRUNO, THE H-2B VISA, *supra* note 7.

14. *See id.*

15. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 4.

analyze the flaws in previously proposed solutions to the statutory cap issue. Part IV will offer a solution to this issue by suggesting a permanent change in the Immigration and Nationality Act that would exempt returning H-2B workers from the cap for a period of two years before having to count toward the cap again.

I. BACKGROUND OF TEMPORARY-FOREIGN-WORKER PROGRAMS

The United States has a long history of utilizing foreign workers, sometimes known as guest workers, to fill temporary jobs.¹⁶ Temporary-foreign-worker programs allow employers in the United States to hire foreign workers when they are unable to find domestic employees.¹⁷ Due to severe labor shortages during World War I and World War II, the United States began using temporary-worker programs in the early 1900s.¹⁸

A. Establishment of the Bracero Program

When the United States entered World War I in 1917, Mexican workers played an important role in sustaining American agricultural production.¹⁹ Until the establishment of the U.S. Border Patrol in 1924,²⁰ the border between the United States and Mexico was virtually unsupervised.²¹ Citizens of Mexico and the United States crossed the border as they pleased, and farmers in the American Southwest recruited seasonal workers from Mexico without government interference or supervision.²² During the beginning of World War II, some Americans were concerned that if the United States entered the war, there would be a

16. BRUNO, H-2A AND H-2B, *supra* note 2, at 1.

17. *See id.*

18. Felter, *supra* note 6.

19. Philip E. Lampe, *Bracero Program*, IMMIGR. TO THE U.S., <https://immigrationtounitedstates.org/389-bracero-program.html> [https://perma.cc/5XUE-VMRM] (last visited Nov. 16, 2021).

20. The U.S. Border Patrol is the uniformed law enforcement arm of the U.S. Customs and Border Protection within the Department of Homeland Security. Congress officially established the U.S. Border Patrol in 1924 in response to increasing illegal immigration. The Border Patrol has the responsibility of combating illegal entries and the growing business of alien smuggling. *What Is the Border Patrol and What Is Its Mission*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/faqs/what-border-patrol-and-what-its-mission> [https://perma.cc/VX93-JRJH] (last visited Oct. 16, 2021).

21. Lampe, *supra* note 19.

22. *Id.*

need for foreign workers as there had been during World War I.²³ The rising need for foreign workers formed the basis for the first temporary-foreign-worker agreement.²⁴ After the United States entered World War II at the end of 1941, the Mexican and United States governments signed the Mexican Farm Labor Program Agreement on August 4, 1942.²⁵ This agreement, known as the Bracero Program, allowed for the recruitment of many laborers from Mexico and expedited processing for their work visas.²⁶ This was the first agreement establishing the legalization and control of Mexican migrant workers along the U.S.'s southern border.²⁷ The Bracero Program acknowledged the sovereignty of Mexico and provided that either government could terminate the program unilaterally by notifying the other party 90 days in advance.²⁸ The program provided the U.S. with workers, known as braceros, to perform mainly agricultural jobs and some nonagricultural jobs in railway maintenance.²⁹

The original Bracero Program was set to expire in 1947; however, there were numerous extensions due to American farms' growing dependence on Mexican labor.³⁰ The Bracero Program lasted for nearly two decades,³¹ during which it took two different forms.³² For braceros working under the original agreement of 1942, the contract was between the worker and the U.S. government, not the specific employer for whom the bracero worked.³³ The post-World War II extensions differed in that the braceros contracted with the employers directly instead of with the U.S. government.³⁴ By the end of the program in 1964, approximately 4.6 million Mexican nationals had come to work in the U.S. as braceros.³⁵

23. *Id.*

24. See generally *Introduction and Background Information for Teachers*, BRACERO HIST. ARCHIVE, <http://braceroarchive.org/teaching> [<https://perma.cc/NSM8-28PF>] (last visited Sept. 19, 2020).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. Lampe, *supra* note 19.

30. *Id.*

31. *Id.*

32. Kristi L. Morgan, *Evaluating Guest Worker Programs in the U.S.: A Comparison of the Bracero Program and President Bush's Proposed Immigration Reform Plan*, 15 BERKELEY LA RAZA L.J. 125, 129 (2004).

33. Morgan, *supra* note 32, at 5.

34. *Id.*

35. *Introduction and Background Information for Teachers*, *supra* note 24.

B. Formal Regulation of Temporary-Foreign-Worker Programs

A few years after the end of World War II, lawmakers sought a way to better regulate foreign workers in the United States, which resulted in the creation of the Immigration and Nationality Act in 1952.³⁶ In 1965, there were major reforms to the INA, establishing the basic outline of U.S. immigration law that remains in place today.³⁷ Many flaws in the 1965 reforms sparked concerns about illegal immigration.³⁸ The topic of illegal immigration became the defining issue for U.S. policymakers in the years following the 1965 reforms.³⁹ Public pressure to act on the issue of illegal immigration resulted in the passage of the Immigration Reform and Control Act (IRCA) in 1986.⁴⁰ The IRCA included, among other things, new civil and criminal penalties against employers who hired unauthorized workers.⁴¹ Congress then passed the Immigration Act of 1990, which set a limit on employment-based visas.⁴² These reforms to the INA help organize and regulate temporary-foreign-worker programs.⁴³

The INA creates categories of aliens, known as nonimmigrants, who are admitted to the United States for a temporary period of time and specific purpose.⁴⁴ The INA categorizes nonimmigrant visas, identifying them by the letters and numbers of the sections of the INA that authorize them.⁴⁵ One of the major nonimmigrant visa categories under the INA is the “H” category for temporary workers, which includes H-1B, H-2A, and H-2B visas.⁴⁶ These categories each have different rules, regulations, and job requirements.⁴⁷ For example, H-1B employs highly skilled workers in fields requiring specialized knowledge, H-2A employs temporary or

36. Felter, *supra* note 6.

37. Marc R. Rosenblum & Kate Brick, *US Immigration Policy and Mexican/Central American Migration Flows: Then and Now*, MIGRATION POL’Y INST. (Aug. 2011), <https://www.migrationpolicy.org/pubs/RMSG-regional-flows.pdf> [<https://perma.cc/2UD4-USVD>].

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *See* Felter, *supra* note 6.

44. BRUNO, H-2A AND H-2B, *supra* note 2, at 2.

45. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 101(a)(15)(H), 66 Stat. 163.

46. *See id.*

47. *See generally* Immigration and Nationality Act.

seasonal agricultural workers, and H-2B employs temporary or seasonal workers for nonagricultural services or labor.⁴⁸

United States employers have had the ability to hire foreign workers for nonagricultural jobs for decades, but the H-2A agricultural and H-2B nonagricultural programs are relatively new.⁴⁹ The original INA of 1952 authorized an H-2 nonimmigrant visa category that covered foreign agricultural and nonagricultural workers who temporarily came to the U.S.⁵⁰ In 1986, the IRCA amended the INA and separated the H-2 program into two job classifications, establishing the current H-2A agricultural worker program and H-2B nonagricultural worker program.⁵¹ The H-2B nonagricultural program, the focus of this Comment, covers a wide variety of jobs, including landscaping, forestry, housekeeping, seafood processing, amusement parks, restaurants, and construction.⁵²

C. H-2B Nonagricultural Program

Several administrative agencies are involved in reviewing and approving petitions for temporary work visas, including the United States Department of Labor (DOL), the Department of Homeland Security (DHS), and the Department of State.⁵³ Before hiring foreign workers under the H-2B nonagricultural program, employers must satisfy several requirements, including a multi-step application process.⁵⁴ Throughout this process, employers have to submit different applications to both the DOL and the United States Citizenship Immigration Services (USCIS).⁵⁵ Employers invest a lot of time and money to properly complete the application process and do so at the risk of remaining unable to hire H-2B workers.⁵⁶ Some employers are faced with this loss if the USCIS has

48. See Immigration and Nationality Act of 1952 § 101(a)(15)(H).

49. See BRUNO, H-2A AND H-2B, *supra* note 2.

50. *Id.* at 2.

51. *Id.* at 2–3.

52. See generally *id.*

53. Felter, *supra* note 6.

54. See *H-2B Temporary Non-agricultural Workers*, U.S.C.I.S., <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2b-temporary-non-agricultural-workers> [<https://perma.cc/4MDF-9UEU>] (last updated June 14, 2021).

55. *Id.* The USCIS is a federal agency that oversees lawful immigration to the U.S and is a component of the Department of Homeland Security. *What We Do*, U.S.C.I.S., <https://www.uscis.gov/about-us/mission-and-core-values/what-we-do> [<https://perma.cc/4DD2-JKAQ>] (last updated Feb. 27, 2020).

56. See *H-2B Temporary Non-agricultural Workers*, *supra* note 54.

already issued the allotted yearly amount of H-2B visas prior to processing those employers' applications.⁵⁷

1. H-2B Certification Process

Applying for H-2B workers is a lengthy process that involves three main steps.⁵⁸ First, a petitioner must apply for a temporary labor certificate (TLC) for H-2B workers with the DOL.⁵⁹ A petitioner cannot submit its labor certification application until 90 to 75 days prior to its desired start date for work.⁶⁰ Before the DOL issues a TLC, the department will send a Notice of Acceptance to the petitioner.⁶¹ Once the petitioner receives a Notice of Acceptance, it has to comply with DOL's Pre-Certification Recruitment Activities requirement of advertising the job to Americans for a certain period of time.⁶² Once the recruitment requirement is completed, the petitioner must submit a Recruitment Report to the DOL.⁶³ At this point in the process, the Secretary of Labor determines whether the employer should be issued a TLC.⁶⁴ When screening H-2B applications for a TLC, the Secretary of Labor has to determine that

(1) [t]here are not sufficient U.S. workers who are qualified and who will be available to perform the temporary services or labor for which an employer desires to hire foreign workers, and that (2) [t]he employment of the H-2B worker(s) will not adversely affect the wages and working conditions of U.S. workers similarly employed.⁶⁵

Second, after receiving a TLC for H-2B employment from the DOL, the petitioner submits the original TLC with a Form I-129⁶⁶ to the

57. *See id.*

58. *Id.*

59. 8 C.F.R. § 214.2 (h)(6)(iii)(A) (2021). This process is different for the Territory of Guam. *See id.* § 214.2 (h)(6)(iii)(C).

60. *See H-2B Temporary Non-agricultural Program*, U.S. DEP'T OF LABOR, <https://www.dol.gov/agencies/eta/foreign-labor/programs/h-2b> [<https://perma.cc/FLP2-L8SB>] (last visited July 22, 2021).

61. *See id.*

62. *See id.*

63. *See id.*

64. *See id.*

65. 20 C.F.R. § 655.1(a)(1) (2021); *id.* § 655.1(a)(2); 8 C.F.R. § 214.2 (h)(6)(iii)(A) (2021).

66. The I-129 form is an application petitioners may file on behalf of a nonimmigrant worker to come to the U.S. temporarily to perform services or

USCIS.⁶⁷ The USCIS then decides whether to approve the application, or in other words, approve the number of H-2B visas the petitioner requested.⁶⁸ Lastly, if the USCIS approves the application, prospective H-2B workers who are outside the United States must apply for an H-2B visa with the U.S. Department of State at a U.S. embassy or consulate abroad.⁶⁹ If issued a visa, the foreign worker must seek admission to the U.S. with U.S. Customs and Border Protection (CBP)⁷⁰ at a U.S. port of entry.⁷¹

Under the current H-2B program, an employer can apply to extend an H-2B worker's stay in increments of up to one year.⁷² New employers can also submit an application to the DHS to ask permission to extend the stay of H-2B workers in the United States in order to work for their company.⁷³ Nevertheless, an alien's total period of stay as an H-2B worker may not exceed three consecutive years.⁷⁴ An H-2B worker who has spent three years in the United States may not seek an extension of stay or gain readmission to the United States as an H-2B worker until he or she has been outside the country for 90 days.⁷⁵

2. *First Come, First Served—Statutory Cap on H-2B Visas*

The USCIS constantly receives H-2B petitions, but once the USCIS grants a certain number of H-2B visas, it does not process any more petitions.⁷⁶ The H-2B program has a statutory numerical limit or “cap” on the total number of aliens who may receive an H-2B visa during a fiscal

labor. *I-129, Petition for a Nonimmigrant Worker*, U.S.C.I.S., <https://www.uscis.gov/i-129> [<https://perma.cc/CS4V-PF5G>] (last updated Feb. 1, 2021).

67. 8 C.F.R. § 214.2 (h)(6)(iv)(A) (2021); *id.* § 214.2 (h)(6)(iii)(E).

68. *See H-2B Temporary Non-agricultural Program*, *supra* note 60.

69. *H-2B Temporary Non-agricultural Workers*, *supra* note 54.

70. The U.S. Customs and Border Protection (CBP) is a law enforcement organization that is charged with keeping terrorists and their weapons out of the U.S. while facilitating lawful international travel and trade. *About CBP*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/about> [<https://perma.cc/PB7Q-3M27>] (last modified Dec. 18, 2020).

71. *H-2B Temporary Non-agricultural Workers*, *supra* note 54.

72. BRUNO, H-2A AND H-2B, *supra* note 2, at 8.

73. *Id.*

74. *Id.*

75. *Id.*

76. *See id.*

year.⁷⁷ The initial cap for H-2B workers, provided in the Immigrant Act of 1990, allowed 66,000 workers per fiscal year.⁷⁸

The REAL ID Act of 2005 amended the INA and effectively divided the annual H-2B cap of 66,000 into two semiannual caps of 33,000.⁷⁹ This means that the USCIS can grant 33,000 visas to workers who begin employment in the first half of the fiscal year, October 1–March 31, and 33,000 to workers who begin employment in the second half of the fiscal year, April 1–September 30.⁸⁰ The REAL ID Act of 2005 also made unused H-2B visas from the first half of the fiscal year available for use in the second half of the fiscal year.⁸¹ The purpose of the split was to establish a fair allocation of visas, allowing more employers an equal opportunity to utilize the H-2B program throughout the entire year.⁸² However, the split disadvantages employers whose start dates fall late in a semiannual period because a petitioner cannot start the petitioning process to DOL until 90 to 75 days prior to its start date for work.⁸³ Thus, if an employer petitions workers for a start date of March 1—approximately one month prior to the end date of the first semiannual period—the employer cannot start the petitioning process until December.⁸⁴ Often, when an employer needs to file late in a semiannual period, such as for a March 1 start date, before that employer can even finish the application process the USCIS has already issued the semiannual limit of 33,000 visas to employers who requested an earlier start date.⁸⁵

In 2004, the demand for foreign workers started to significantly exceed than the number of available visas.⁸⁶ On March 9, 2004, the USCIS issued the set number of H-2B visas available under the cap for the first time since the creation of the cap in 1990.⁸⁷ On January 4, 2005, USCIS issued all the available visas for fiscal year (FY) 2005, just 3 months into

77. *Cap Count for H-2B Nonimmigrants*, U.S.C.I.S., <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2b-non-agricultural-workers/cap-count-for-h-2b-nonimmigrants> [<https://perma.cc/38VK-LR49>] (last updated Feb. 24, 2021).

78. *See* Immigration and Nationality Act of 1990, Pub. L. No. 101-649, § 214(g)(1)(B), 104 Stat. 4978.

79. *See id.* § 214(g)(10).

80. *See id.*

81. *See id.*

82. BRUNO, *THE H-2B VISA*, *supra* note 7, at 4.

83. *See H-2B Temporary Non-agricultural Program*, *supra* note 60.

84. *See generally id.*

85. *See generally* BRUNO, *THE H-2B VISA*, *supra* note 7.

86. *See* U.S.C.I.S., *H-2B USAGE AND RECOMMENDATIONS* (2016) [hereinafter U.S.C.I.S., *H-2B USAGE*].

87. *Id.* at 3.

the fiscal year.⁸⁸ The early filling of the FY 2005 H-2B cap prevented many spring and summer seasonal employers from receiving foreign workers through the H-2B program.⁸⁹ The DOL typically saw a significant spike in TLC applications from employers seeking to hire H-2B workers for warmer weather months, which fall in the second half of the fiscal year.⁹⁰ The high demand for H-2B workers and the disadvantage the cap had on spring and summer employers motivated Congress and federal agencies to take steps to alleviate the issue.⁹¹

D. Temporary Changes in Relation to the H-2B Statutory Cap

Changes to temporary-foreign-worker programs, such as numerical caps, must receive congressional approval; however, the President of the United States has the authority to unilaterally change some regulations and can determine how federal agencies implement them.⁹² Since 2005, Congress and federal agencies have enacted different provisions to provide for the issuance of H-2B visas or the granting of H-2B status beyond the statutory cap.⁹³ The enacted provisions fall into two main classifications: the returning-worker exemptions and provisions authorizing additional H-2B visas.⁹⁴

1. Returning-Worker Exemptions

In response to demand for H-2B workers outweighing the number of H-2B visas available, Congress has enacted two temporary returning-worker exemptions: the Save Our Small and Seasonal Business Act of 2005 (SOS Act) and the Consolidated Appropriations Act of 2016.⁹⁵ Title IV of the REAL ID Act of 2005, also known as the SOS Act, implemented two specific modifications of the H-2B cap.⁹⁶ The first modification separated the annual H-2B cap into two equal halves.⁹⁷ The second

88. *Id.*

89. *Id.*

90. Exercise of Time-Limited Authority to Increase the Fiscal Year 2019 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program, 84 Fed. Reg. 20005, 20006 (May 8, 2019) (to be codified at 8 C.F.R. pt. 214).

91. *See generally* BRUNO, THE H-2B VISA, *supra* note 7.

92. Felter, *supra* note 6.

93. BRUNO, THE H-2B VISA, *supra* note 7, at 5.

94. *Id.*

95. *See id.*

96. U.S.C.I.S., H-2B USAGE, *supra* note 86, at 3.

97. *Id.*

modification created a special temporary exemption from the cap for certain returning H-2B workers. Specifically, section 402 of the REAL ID Act of 2005 allowed USCIS to exempt⁹⁸ returning workers from the H-2B cap for FYs 2005 and 2006.⁹⁹ The INA defines “returning worker” as an H-2B worker who was previously counted against¹⁰⁰ the annual numerical limit of 66,000 during any one of the three prior fiscal years.¹⁰¹ Even though this legislation, commonly referred to as the returning-worker program, was initially set to expire on September 30, 2006, the National Defense Authorization Act extended the program for FY 2007.¹⁰²

The number of H-2B visas issued increased every year from 1993 to 2007, but declined in 2008 and 2009.¹⁰³ In 2010, however, the number of visas issued began increasing again and has steadily risen ever since.¹⁰⁴ Due to the continued increase in demand for H-2B workers, Congress passed the Consolidated Appropriations Act in 2016.¹⁰⁵ Similar to the SOS Act enacted in 2005, the Consolidated Appropriations Act provided that an H-2B returning worker who counted against the cap in FY 2013, FY 2014, and FY 2015 would not be counted again in FY 2016.¹⁰⁶ The H-2B returning-worker provisions of the Consolidated Appropriations Act expired on September 30, 2016.¹⁰⁷ Even though Congress intended for the 2016 Act to provide some relief from the cap, the USCIS still issued all available H-2B visas at an early period, leaving submitted petitions unprocessed and many employers without workers.¹⁰⁸

98. A returning worker who is “exempt” from the cap means that the returning worker is issued an H-2B visa that is not counted against the 66,000 cap. *See* BRUNO, *THE H-2B VISA*, *supra* note 7.

99. U.S.C.I.S., *H-2B USAGE*, *supra* note 86, at 3.

100. The term “counted against” means the worker received an H-2B visa that was taken out of the annual 66,000 limit during one of the three prior fiscal years. *See* BRUNO, *THE H-2B VISA*, *supra* note 7.

101. *See* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 214(g)(9)(a), 66 Stat. 163.

102. U.S.C.I.S., *H-2B USAGE*, *supra* note 86, at 4.

103. *See generally* BRUNO, *THE H-2B VISA*, *supra* note 7.

104. *See id.*

105. *Id.* at 5.

106. *See* Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, Div. F, Title V, § 565, 129 Stat. 2243.

107. *See Cap Count for H-2B Nonimmigrants*, *supra* note 77.

108. Loan Huynh, *The American Economy Needs Changes to the H-2B Temporary Worker Program*, THINK IMMIGR. (Aug. 8, 2017), <https://thinkimmigration.org/blog/2017/08/08/the-american-economy-needs-changes-to-the-h-2b-temporary-worker-program/> [<https://perma.cc/R76J-VXLR>].

2. Provisions Authorizing Additional H-2B Visas

Starting in 2017, the DHS and the DOL took a different approach than the 2016 returning-worker exemption in order to help U.S. employers that were not able to receive H-2B workers due to the limited number of visas.¹⁰⁹ These federal agencies enacted a new type of H-2B visa cap-related provision, which authorized additional H-2B visas in FY 2017.¹¹⁰ The DHS and DOL enacted a similar provision that authorized additional H-2B visas in FY 2018 and again in FY 2019.¹¹¹

By March 13, 2017, USCIS had already received more than enough H-2B petitions to meet the cap for the second half of the fiscal year.¹¹² Typically once the cap is met, petitioners must wait until the next half of the fiscal year or the beginning of the next fiscal year for additional cap-subject visas to become available.¹¹³ However, on May 5, 2017, President Trump signed the FY 2017 Omnibus, which contained a provision that provided the Secretary of Homeland Security with the opportunity to increase the total number of aliens who may receive an H-2B visa in FY 2017.¹¹⁴ The number of visas could only be increased after the Secretary of Homeland Security consulted with the Secretary of Labor and determined that the needs of American businesses could not be satisfied in FY 2017 with U.S. workers who were willing, qualified, and able to perform temporary nonagricultural labor.¹¹⁵ The maximum number of additional H-2B visas that the 2017 provision authorized could not exceed the highest number of H-2B workers who participated in the H-2B returning-worker program in any fiscal year in which returning workers were exempt from the H-2B numerical cap.¹¹⁶ Under the 2017 provision, the DHS and the DOL submitted a rule to the Federal Register¹¹⁷ that

109. See BRUNO, *THE H-2B VISA*, *supra* note 7.

110. *Id.* at 5.

111. *See id.*

112. Exercise of Time-Limited Authority to Increase the Fiscal Year 2017 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program, 82 Fed. Reg. 32987, 32988 (July 19, 2017) (to be codified at 8 C.F.R. pt. 214).

113. *Id.*

114. Consolidated Appropriations Act of 2017, Pub. L. No. 115-31, § 543, 131 Stat. 135.

115. *Id.*

116. The highest number of returning workers in any such fiscal year was 64,716, which represents the number of workers covered by H-2B returning-worker petitions that were approved in FY 2007. *Id.*

117. The Office of the Federal Register (OFR) prepares and publishes a wide variety of public documents, including federal agency regulations having general applicability and legal effect and proposed agency rules. All federal regulations

allowed 15,000 extra H-2B visas because United States businesses were in danger of suffering irreparable harm due to a lack of available temporary, nonagricultural workers.¹¹⁸ In order for employers to receive these extra H-2B workers, petitioners had to submit an attestation, under penalty of perjury, that their business was likely to suffer irreparable harm if it could not employ H-2B nonimmigrant workers during FY 2017.¹¹⁹ Overall, the USCIS issued 12,294 supplemental H-2B visas under this provision in FY 2017.¹²⁰

On January 1, 2018, the initial date that employers could submit H-2B TLC applications requesting the work start date of April 1, 2018, the DOL received about 4,500 applications, requesting a total of 81,008 workers.¹²¹ The USCIS announced on March 1, 2018, that in the first five business days of accepting H-2B petitions for the second half of FY 2018, it had received petitions requesting about 47,000 H-2B workers that would count toward the cap.¹²² The number of workers requested was more than the USCIS could accommodate under the 33,000 cap.¹²³ The USCIS also reported that in order to allocate the limited amount of visas, it would conduct a lottery in February that would randomly select a sufficient number of approved petitioners to whom visas would be issued.¹²⁴ Due to the high demand for workers, the DOL and the DHS jointly published a final rule at the end of May 2018.¹²⁵ The published rule was the same as that in FY 2017 and authorized the issuance of up to 15,000 additional H-2B visas for FY 2018.¹²⁶ In the first five business days of accepting petitions under this supplemental cap, USCIS received petitions for

in force are codified annually in the Code of Federal Regulations. *Federal Register Office*, FED. REG., <https://www.federalregister.gov/agencies/federal-register-office> [<https://perma.cc/PPG7-R8ER>] (last visited Nov. 22, 2021).

118. BRUNO, THE H-2B VISA, *supra* note 7, at 5.

119. *See id.*

120. Exercise of Time-Limited Authority to Increase the Fiscal Year 2019 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program, 84 Fed. Reg. 20005, 20007 (May 8, 2019) (to be codified at 8 C.F.R. pt. 214). Extra visas issued under the provision are referred to as supplemental visas.

121. *Id.* at 11.

122. *Id.*

123. *Id.*

124. *Id.*

125. Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, § 205, 132 Stat. 348.

126. BRUNO, THE H-2B VISA, *supra* note 7, at 7.

approximately 29,000 workers.¹²⁷ Ultimately, 15,672 supplemental visas were approved under the “possibility that some approved workers would either not seek a visa or admission, would not be issued a visa, or would not be admitted to the United States.”¹²⁸

Despite the temporary provisions in 2017 and 2018, employer demand for H-2B workers continued to rise and reached new heights in the second half of FY 2019.¹²⁹ January 1, 2019, was the first day that employers could file H-2B labor certification applications for the second half of FY 2019. On January 2, 2019, the DOL announced that its online application filing system had “experienced a system disruption” that prevented some employers from submitting their H-2B certification applications.¹³⁰ As of January 8, 2019, the DOL’s Office of Foreign Labor Certification had received requests to certify more than 96,400 worker positions for start dates of April 1, “a number nearly three times greater than the entire semi-annual visa allocation.”¹³¹ February 19, 2019, was the first day that the USCIS accepted H-2B petitions for the second half of FY 2019.¹³² On that day, USCIS announced that it had received petitions for more H-2B workers than there were available H-2B visas under the FY 2019 cap.¹³³ The DHS and the DOL jointly published a final rule in May 2019 to implement the FY 2019 provision, which authorized the issuance of up to 30,000 additional H-2B visas for FY 2019.¹³⁴ The DOL considered the overall indications of an increased need for H-2B visas when deciding to increase the number of supplemental visas to 30,000.¹³⁵ The DOL felt that 30,000 was reasonable because it “will better ensure that additional H-2B visas will be available to businesses that need H-2B workers.”¹³⁶

127. Exercise of Time-Limited Authority to Increase the Fiscal Year 2019 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program, 84 Fed. Reg. 20005, 20009 (May 8, 2019) (to be codified at 8 C.F.R. pt. 214).

128. *Id.* at 20007 n.8.

129. BRUNO, THE H-2B VISA, *supra* note 7, at 11.

130. *Id.*

131. Exercise of Time-Limited Authority to Increase the Fiscal Year 2019 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program, 84 Fed. Reg. at 20006.

132. BRUNO, THE H-2B VISA, *supra* note 7, at 12.

133. Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, § 105, 134 Stat. 1182.

134. BRUNO, THE H-2B VISA, *supra* note 7, at 8.

135. *Id.*

136. Exercise of Time-Limited Authority to Increase the Fiscal Year 2019 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program, 84 Fed. Reg. at 20009.

The FY 2019 rule imposed a limitation that was not applicable under the FY 2017 and FY 2018 rules.¹³⁷ The new limitation stated that an employer could request supplemental visas only for H-2B returning workers who had been issued an H-2B visa or otherwise granted H-2B status in fiscal years 2016, 2017, or 2018.¹³⁸ One incentive to enact this new rule was the idea that returning workers have generally demonstrated the willingness to return home after they completed their temporary labor or service or period of authorized stay.¹³⁹ In turn, the DHS and DOL enacted this new rule in order to minimize the amount of foreign workers overstaying visas.¹⁴⁰ The returning-worker condition “provide[d] a basis to believe that H-2B workers under [the] cap increase [would] likely return home again after another temporary stay in the United States.”¹⁴¹ Today, there are additional benefits for H-2B workers who have a track record of abiding by the regulations.¹⁴² For example, H-2B workers who can clearly demonstrate having previously abided by the terms of their status tend to be issued their H-2B visas at a higher rate when applying to renew, as compared with the overall visa applicant pool from a given country.¹⁴³

Within the first three days of filing for the second half of FY 2020, the DOL received 5,677 H-2B applications for TLCs requesting the earliest start date, April 1, 2020.¹⁴⁴ The applications covered 99,362 worker positions.¹⁴⁵ On February 18, 2020, USCIS announced that it had received petitions for more H-2B workers than there were remaining H-2B visas.¹⁴⁶ As a result, the USCIS conducted a lottery on February 20, 2020, in order to randomly allocate these visas to approved petitioners.¹⁴⁷ On March 4, 2020, the DHS announced that it would make available 35,000 supplemental H-2B visas for the second half of the fiscal year.¹⁴⁸ However,

137. Consolidated Appropriations Act, 2019.

138. BRUNO, THE H-2B VISA, *supra* note 7, at 8.

139. Exercise of Time-Limited Authority to Increase the Fiscal Year 2019 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program, 84 Fed. Reg. at 20006.

140. *Id.*

141. *Id.* at 20008.

142. *Id.* at 20006.

143. *Id.* at 20008.

144. BRUNO, THE H-2B VISA, *supra* note 7, at 13.

145. *Id.*

146. *Id.*

147. *Id.*

148. Exercise of Time-Limited Authority to Increase the Fiscal Year 2021 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking to Change Employers, 86 Fed. Reg. 28198, 28216 (May 25, 2021) (to be codified at 8 C.F.R. pt. 214).

on April 2, 2020, the DHS announced that the rule to increase the H-2B cap was on hold due to economic circumstances involving COVID-19, and no additional H-2B visas would be released until further notice.¹⁴⁹

The DHS kept the program on hold until May 2021 when the DHS and the DOL chose to again exercise its authority to increase the number of H-2B visas given the level of demand for H-2B workers and other economic factors.¹⁵⁰ The DHS and the DOL authorized the issuance of up to 22,000 additional H-2B visas for the remainder of FY 2021.¹⁵¹

After President Trump signed the 2017 Omnibus, Secretary of Homeland Security John Kelly determined that there were not enough qualified and willing U.S. workers available to perform temporary nonagricultural labor to satisfy the needs of American businesses.¹⁵² This statement reflects the rationale behind the 2018 and 2019 provisions as well.¹⁵³ The fact that the semiannual cap of 33,000 has been met in each half of the fiscal year since FY 2015 accurately supports the belief that there are not enough qualified and willing U.S. workers available to perform temporary, nonagricultural labor.¹⁵⁴ It is clear from the 2005–2020 data showing the significant number of petitions for H-2B workers that these temporary attempts by Congress and federal agencies have failed to provide effective relief to employers who need H-2B workers.¹⁵⁵

II. ISSUES WITH THE CURRENT CAP

The statutory cap creates a direct conflict with the purpose of the H-2B program and harms U.S. businesses. The purpose of the H-2B program is to provide employers with an option to hire foreign workers when U.S. workers are unavailable.¹⁵⁶ Because the statutory cap of 66,000 is not indicative of the demand for H-2B workers, many employers are left without workers.¹⁵⁷ Employers who cannot find U.S. workers to perform temporary or seasonal labor turn to the H-2B program for help; however,

149. *Id.*

150. *Id.* at 28207.

151. *Id.* at 28198.

152. *DHS Provides Relief to American Businesses in Danger of Suffering Irreparable Harm*, U.S.C.I.S., <https://www.uscis.gov/archive/dhs-provides-relief-to-american-businesses-in-danger-of-suffering-irreparable-harm> [<https://perma.cc/MPU7-ANT8>] (last updated July 19, 2017).

153. *See generally* BRUNO, *THE H-2B VISA*, *supra* note 7.

154. *Id.* at 10.

155. *See generally id.*

156. *See generally* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 4.

157. *See discussion infra* Section II.B.

when the H-2B program fails them, there is nowhere else to turn.¹⁵⁸ The low availability of H-2B visas has caused uncertainty for employers and in turn, has negatively affected businesses across the U.S.

A. An Outdated Policy: Time for a Change

It is clear that demand for H-2B workers exceeds the current limit. The shortage of H-2B visas “calls into question the ability of Congress to predict years in advance the number of temporary workers that U.S. businesses legitimately will need on an annual basis.”¹⁵⁹ The creation of the cap in 1990 resulted from a political compromise focused on addressing a fear of illegal immigration completely unrelated to the labor market projection of the time.¹⁶⁰ Therefore, the cap certainly bears little relationship to today’s economic reality.¹⁶¹ For example, the average number of H-2B visas issued per year in the early 1990’s was around 11,000, whereas the average from 2016 to 2019 was around 87,000.¹⁶² Imposing arbitrary limits on the number of H-2B workers does not accurately represent the legitimate needs of U.S. businesses.¹⁶³ Because the statutory cap does not reflect the amount of H-2B workers needed, the cap negatively effects employers and their businesses.

B. Negative Effects on Various U.S. Businesses

The low availability of H-2B visas causes uncertainty for employers and puts a strain on economic growth.¹⁶⁴ The United States Government Accountability Office conducted a study and found that the shortage of H-2B visas affects businesses across the U.S. in different ways depending on the particular industry.¹⁶⁵ Some employers’ operations depend solely on whether they receive the number of H-2B workers requested.¹⁶⁶ Thus, a decrease in the number of workers received and the uncertainty

158. See generally U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 4.

159. Benjamin Johnson, *Labor Market Numerology: Arbitrary Congressional Limits on Temporary Worker Visas*, IMMIGR. POL’Y CTR., <https://www.americanimmigrationcouncil.org/sites/default/files/research/Brief16%20-%20Labor%20Markt%20Numerology.pdf> [<https://perma.cc/6MUH-FH7B>] (last visited Oct. 22, 2021).

160. *Id.*

161. *Id.*

162. See generally BRUNO, *THE H-2B VISA*, *supra* note 7.

163. Johnson, *supra* note 159.

164. See generally U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 4.

165. See *id.*

166. *Id.* at 16.

surrounding receiving workers has disproportionately affected certain industries.¹⁶⁷ In FY 2019, the states in which businesses employed the most H-2B workers were, from highest to lowest: Texas, Colorado, Florida, North Carolina, Pennsylvania, Louisiana, Alaska, New York, Virginia, and Maryland.¹⁶⁸ Although employers in these states hire H-2B workers for different industries, each industry has experienced similar negative impacts from a lack of H-2B visas.¹⁶⁹

1. Non-Food Industries

In North Carolina, H-2B workers mainly work in the landscaping and tourism industries.¹⁷⁰ In 2017, North Carolina received 4,324 worker certifications.¹⁷¹ Ninety-three North Carolina employers applied for H-2B visas in FY 2017, but only two-thirds of those received all of the visas for which they applied, according to Office of Foreign Labor Certification data.¹⁷² More than 400 visa applications were not certified, leaving many businesses with an unexpected shortage of workers.¹⁷³ One North Carolina employer applied for 15 visas for his construction company but did not receive any H-2B workers, which limited his company's sales.¹⁷⁴ Another construction employer, Maribell Romero, stated that it was hard to find local workers who were committed to working 55-hour weeks in construction jobs.¹⁷⁵ Maribell turned to the H-2B program to find workers in 2015 and 2016 but did not receive any H-2B workers. Expressing her concerns about having to turn down jobs, she stated, "We have the contract in our hands, but we just don't know how we're going to do it without any workers."¹⁷⁶

Employers in Texas typically need H-2B workers for residential and commercial landscaping jobs such as lawn care maintenance, planting

167. *Id.*

168. BRUNO, H-2A AND H-2B, *supra* note 2, at 26.

169. *See generally* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 4.

170. Taylor Blatchford, *NC Businesses Feel the Pain of Cuts to Seasonal Worker Visas*, THE CHARLOTTE OBSERVER, <https://www.charlotteobserver.com/news/business/article159412859.html> [<https://perma.cc/C2RT-VPJS>] (last updated July 7, 2017).

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

trees, and building outdoor living spaces.¹⁷⁷ Texas employers reported that lower local unemployment and the intensive manual labor in the heat made it challenging to recruit U.S. workers, so they turned to the H-2B program to find employees.¹⁷⁸ In 2017, one Texas-based landscaping business stopped accepting new contracts and reduced investments in new equipment because of the uncertainty of receiving enough workers through the H-2B program.¹⁷⁹ In 2018, a few Texas employers who didn't receive all requested H-2B workers or received them late reported that it resulted in declines in both revenue and supply purchases.¹⁸⁰

In Michigan and Massachusetts, hospitality H-2B workers perform work such as housekeeping and food service.¹⁸¹ Michigan and Massachusetts hospitality employers experienced revenue declines due to the lack of availability of H-2B visas.¹⁸² Some employers reported that the lack of H-2B workers affected the quality of their services and led them to reduce their operations.¹⁸³ For example, one resort had to close down a popular restaurant due to a lack of workers.¹⁸⁴ Additionally, one hospitality employer in Michigan decided not to invest in expanding its hotel amenities or making renovations due to the uncertainty of being able to hire enough H-2B workers.¹⁸⁵

Employers in Arizona typically need H-2B workers for construction jobs.¹⁸⁶ H-2B workers perform manual labor such as building housing panels or drywalling.¹⁸⁷ Some construction employers have not experienced significant revenue declines because H-2B workers only make up a small portion of their workforce.¹⁸⁸ Nevertheless, employers reported that if they would have received H-2B workers in 2018, they may have experienced a revenue increase compared to 2017 due to the expansion of the construction industry.¹⁸⁹ However, because of the inability to hire H-2B workers, these employers did not have the

177. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 4.

178. *See id.*

179. *Id.* at 25.

180. *Id.* at 24.

181. *Id.* at 27.

182. *Id.*

183. *Id.* at 28.

184. *Id.* at 28–29.

185. *Id.* at 16–17.

186. *Id.* at 25.

187. *Id.*

188. *Id.* at 26.

189. *Id.*

opportunity to expand.¹⁹⁰ When construction and other non-food industry employers experience worker shortages, they attempt to deal with the impact by spreading work throughout the year.¹⁹¹ In contrast, some employers in the food industry do not have the opportunity to seek relief by delaying jobs or spreading work out.¹⁹²

2. Food Industries

The effects that the H-2B visa cap has on businesses are dependent on industry-specific factors.¹⁹³ For example, many employers in Maryland hire H-2B workers to pick meat out of crabs, and the strict seasonality of crab-picking makes delays in receiving workers very problematic; these employers are not able to delay work until a later part of the year.¹⁹⁴ Some employers that have not received H-2B workers in time for the start of their seasonal work period have experienced revenue declines.¹⁹⁵ Others that have not received H-2B workers had to shut down their operations for the first half of the season.¹⁹⁶ Due to the uncertainty related to receiving H-2B workers, a Maryland seafood-processing employer could not implement planned investments, such as expanding its facilities or purchasing trucks for transporting goods, and was forced to temporarily shut down its business.¹⁹⁷ Other seafood employers stated that not getting H-2B workers or getting them late in the season even led to a reduction in U.S. employment.¹⁹⁸ For instance, truck drivers and administrative staff declined without H-2B workers to perform the crab-picking work.¹⁹⁹ Maryland employers rely on the H-2B program because they face challenges in hiring U.S. workers, who are reluctant about working in seafood-processing due to the strict seasonality, the nature of the work, and the employers' remote locations.²⁰⁰

190. *See generally id.*

191. *Id.* at 26.

192. *See generally id.*

193. *Id.* at 23.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *See generally id.*

The H-2B program supplies workers in Louisiana for its different processing industries, namely meat, fish, and sugar processing.²⁰¹ A 2018 newspaper article discussed the concerns of Louisiana employers that were worried about whether there would be enough H-2B visas available.²⁰² The article focused on an owner of a business that processes crawfish and chops alligator meat.²⁰³ A few years prior to 2018, the business owner did not receive any of the H-2B workers he petitioned for, forcing him to cancel contracts and cut back his operations.²⁰⁴ The owner revealed that the same thing happened to many crawfish farmers in 2018.²⁰⁵ He explained that it was impossible to make a business plan because it is hard to make a commitment to the chain stores that buy his product when his workforce is in question.²⁰⁶ Similarly, Louisiana sugarcane farmers often face the risk of losing their crop due to not being able to harvest on time because of worker shortages.²⁰⁷

In an article discussing temporary foreign labor in Louisiana, the authors proposed, “One reason employers may find it difficult to fill temporary positions is that most people desire more stable, permanent jobs.”²⁰⁸ In an interview with Dr. Mike Strain, the Commissioner of the Louisiana Department of Agriculture and Forestry, Dr. Strain stated that Americans do not want temporary jobs; they want permanent jobs.²⁰⁹ Dr. Strain also discussed how uncertainty harms businesses and stated that the lack of H-2B workers is causing industries not to expand.²¹⁰

Overall, the limited number of H-2B workers available is straining businesses across the U.S. by causing employers to turn down new work opportunities and in some cases, causing businesses to close. Without a change to the cap, many employers and their domestic workforce will

201. Michael Deliberto & Mark J. Schafer, *Temporary Foreign Labor and Sugar in Louisiana*, LSU AG CENTER (June 6, 2018), <https://www.lsuagcenter.com/profiles/lbenedict/articles/page1528311878321> [<https://perma.cc/5GKF-4SQY>].

202. Bryn Stole, *Growing Demand for Foreign Guest Workers and Cap on Visas Has Landscapers and Seafood Processors Fretting*, THE ADVOCATE (Sept. 10, 2018), https://www.theadvocate.com/baton_rouge/news/article_9117e718-b2e2-11e8-918c-dba0290bb3b.html [<https://perma.cc/MPR8-YFWG>].

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *See id.*

208. Deliberto & Schafer, *supra* note 201.

209. Interview with Dr. Mike Strain, Commissioner of the Louisiana Department of Agriculture and Forestry (Sept. 9, 2020).

210. *Id.*

continue to suffer drastic economic hardships. While Congress and federal agencies have recognized this problem and tried to provide relief with temporary solutions, they have also searched for a solution that would provide more permanent relief to employers.

III. PREVIOUS PROPOSALS MISS THE MARK

In response to Congress's temporary provisions and federal agencies failing to provide effective relief to employers, the DHS and many legislators have proposed additional solutions to help employers in need of H-2B workers. However, if implemented, the DHS's proposals would not provide the relief necessary for U.S. employers and would not address the issues of uncertainty and strain on economic growth. Additionally, the proposed legislation was not popular enough to receive a majority vote in both the House of Representatives and the Senate.²¹¹

A. Department of Homeland Security's Proposals

On June 7, 2019, the DHS issued a report to Congress addressing the issue of unavailability of H-2B visas for employers that need foreign workers.²¹² In the report, the DHS laid out six potential options to provide relief to late-season filers.²¹³ Each of the solutions presented its own issues and complications to the existing system.

1. Proposal 1: Create a Merit-Based Standard for H-2B Eligibility

The DHS proposed the creation of a points system "based on activity, industry, and/or contributions of [H-2B] workers to the United States."²¹⁴ The DHS proposal would require H-2B petitioners to use the points-based system to establish the relative merit of their business activity or industry when petitioning for H-2B workers.²¹⁵ The idea behind this proposal is to "ensure that the limited H-2B visa numbers are reserved for employers or industries that truly need H-2B workers and have demonstrated a significant contribution to the U.S. economy in an area where H-2B

211. See discussion *infra* Section III.B.

212. See U.S.C.I.S., OPTIONS FOR REFORMING THE H-2B VISA PROGRAM AND IMPROVING LATE SEASON EMPLOYERS' ACCESS TO WORKERS (2019) [hereinafter U.S.C.I.S., OPTIONS FOR REFORMING].

213. *Id.*

214. *Id.* at 6.

215. *Id.*

workers are needed.”²¹⁶ This option is complex and does not elaborate on exactly how an H-2B petitioner would establish the relative merit of its business activity or industry.²¹⁷ Its goal is to ensure that only the most deserving petitioners receive the limited number of H-2B visas available,²¹⁸ but it does not answer the question of what would happen if the number of deserving petitioners exceeds the annual cap of 66,000.²¹⁹ This option does not recommend providing any type of additional visas or changing the number of the annual cap.²²⁰ Furthermore, it is unclear how one would determine whether a petition meets the status of a “deserving petition.”²²¹

2. Proposal 2: Designate a List of Industries or Occupations Eligible for H-2B Visas

The second DHS proposal suggested that “Congress could designate certain industries or occupations in which the use of H-2B visas would have the greatest net positive impact on the American economy.”²²² The DHS also mentioned that “Congress could require that DHS annually update a list of eligible industries or occupations for H-2B visas on the basis of prescribed economic indicators such as overall unemployment rates within an industry.”²²³ The idea behind this proposal is to create a narrower list of occupations that may seek foreign workers for temporary jobs.²²⁴ Industries and occupations that do not have the greatest net-positive impact on the American economy but truly need H-2B workers may fall outside of the list Congress sets forth. Therefore, this proposal poses a risk of straining economic growth within the United States by limiting the industries that can receive H-2B workers.²²⁵ This proposal would actually increase uncertainty with H-2B visa issuance because an employer may be authorized to receive H-2B visas one year and not the next if they no longer fall within the list of industries that can apply for H-2B workers.²²⁶ Additionally, due to the nature of H-2B jobs, average

216. *Id.*

217. *See id.*

218. *Id.*

219. *See generally id.* at 6–7.

220. *Id.* at 6.

221. *See generally id.*

222. *Id.* at 7.

223. *Id.*

224. *See id.*

225. *See generally id.*

226. *See generally id.*

unemployment estimates by occupation do not accurately reflect the demand for particular types of H-2B workers in specific areas at specific times of the year.²²⁷

3. Proposal 3: Designate Cap Numbers for Individual Industries

The third DHS proposal suggested that Congress “designate cap numbers for the industries that would produce the greatest net positive impact on the American economy if aided by H-2B workers,” and “give those petitioners preferential access to cap-subject H-2B visas.”²²⁸ In the alternative, DHS proposed that Congress create a standard for designating the cap number for industries and have the list updated each year “on the basis of prescribed economic indicators.”²²⁹ To the first part of the proposal, giving specified industries preferential access to cap-subject H-2B visas is highly unfair to industries that may not have a significant impact on the American economy but are still in need of H-2B workers in order to maintain their business. The alternative proposal that Congress create a standard for designating the cap number for industries would not relieve the issue of uncertainty; Congress would update the designated number for industries each year, causing uncertainty among employers about whether enough visas will be available for their industry. Furthermore, DHS did not elaborate on a particular standard for designating the cap number for industries or if such a standard would accurately represent the need for H-2B workers in each industry.²³⁰

4. Proposal 4: Require Employers to Name All Beneficiaries on H-2B Petitions

The fourth DHS proposal required that an employer name each H-2B worker on every petition because employers may pad petitions with unnamed workers.²³¹ Currently, employers can end up with more visas than they use because they are requesting a specific number of workers, rather than specifically naming the individuals that will be working if granted H-2B visas.²³² For example, an employer can petition for 50 workers, get approved for 50 visas, and end up using only hiring 40 H-2B workers, leaving 10 visas unused. Requiring an employer to name each H-

227. See U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 4.

228. U.S.C.I.S., OPTIONS FOR REFORMING, *supra* note 212, at 7.

229. *Id.*

230. See generally *id.*

231. *Id.*

232. See generally *id.*

2B worker on petitions would provide a more accurate number of workers an employer will be hiring, therefore decreasing the risk of employers being approved for more visas than they use.²³³ This proposal could potentially provide some relief to the issue of unavailability because it may allow more visas to be available for late-season filers. Nevertheless, it is unclear if it will truly make more visas available and, if so, how significant the impact will be.²³⁴ DHS stated that employers can end up with more H-2B visas than they use, but it did not provide statistics on how often this occurs.²³⁵ If data were made available on the accurate number of H-2B visas that are issued and not used, the impact this proposal would have on the issue at hand would be clearer. If only a few hundred issued visas are not being used, this proposal would not make the needed significant impact, considering the number of requests to certify H-2B worker positions has exceeded the annual cap by thousands.²³⁶

*5. Proposal 5: Create a Statutory Definition of the Phrase
“Temporary Service or Labor”*

Because the INA does not define the phrase “temporary service or labor,” the DHS proposed that Congress create a specific definition for the term “temporary service or labor,” limiting the duration period for temporary need.²³⁷ The DHS stated that “[b]y creating this definition, Congress could ensure better that employers are using the H-2B visa program properly to meet legitimate temporary need.”²³⁸ DHS also believes that limiting the duration period for temporary need may lessen demand and provide late-season filers, such as summer employers, a better chance at receiving H-2B visas under the cap.²³⁹ Nevertheless, the DHS recognized the possibility of employers submitting more petitions because they will be requesting more distinct positions with shorter duration, thereby increasing competition for visas under the cap.²⁴⁰ Despite the INA not specifically defining the phrase “temporary service or labor,” for purposes of the H-2B program USCIS defines “temporary need” generally as a period of one year or less for seasonal peak load, an intermittent need,

233. *Id.*

234. *See generally id.* at 7–8.

235. *See generally id.*

236. *See discussion supra* Section I.D.2.

237. U.S.C.I.S., *OPTIONS FOR REFORMING*, *supra* note 212, at 8.

238. *Id.*

239. *Id.*

240. *Id.*

or in the case of a one-time occurrence, a period of up to three years.²⁴¹ If Congress creates a specific definition for “temporary service or labor,” it would have to be careful not to define it in such a way that would conflict with the USCIS’s definition for “temporary need” in order to avoid confusion. Furthermore, if Congress creates a definition that is too narrow, it could potentially deprive businesses of H-2B workers that fall outside of the definition but still have somewhat of a temporary labor task.

6. Proposal 6: Distribute Cap Numbers on a Quarterly Basis

The sixth DHS proposal suggested that the 66,000 cap be split into quarters, and that 16,500 H-2B visas be allocated per fiscal quarter.²⁴² Like the current process, unused cap numbers from one quarter could be made available during a later quarter of the same fiscal year.²⁴³ DHS recognized that this option may not correct the full scope of inequities for employers with late-season needs, but it may give those employers a better chance at obtaining visas.²⁴⁴ DHS stated that “USCIS likely would be required to implement a lottery if USCIS receives petitions requesting more than 16,500 H-2B visas during the first 5 business days”²⁴⁵ The fact that the USCIS would likely have to implement a lottery to allocate H-2B visas to employers under this proposal adds to the problem of uncertainty for employers.²⁴⁶ The DHS even recognized this potential flaw by stating, “[C]hange that increases the likelihood of a lottery may increase rather than decrease uncertainty for businesses that rely on the H-2B program because of the speculative nature of the random selection.”²⁴⁷ Additionally, this proposal does not address the fact that employers are in need of more than 66,000 H-2B visas a year or propose a solution for increasing this amount.²⁴⁸

B. Legislative Bills

Over the past few years, legislators have proposed bills that address the unavailability of H-2B visas.²⁴⁹ Some bills specifically address raising

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *See id.*

247. *Id.*

248. *See id.*

249. *See* BRUNO, THE H-2B VISA, *supra* note 7.

the yearly number of H-2B visas available and others suggest changing the process in which the USCIS issues H-2B visas.²⁵⁰ One bill even creates a completely new temporary foreign worker category that can be seen as a hybrid between the H-2A agricultural and H-2B nonagricultural programs. Nevertheless, none of the proposed bills have gained Congress's support.²⁵¹

1. Permanent Returning-Worker Provisions

Many of the bills propose that Congress amend the INA to make a permanent returning-worker provision,²⁵² similar to the temporary provisions that Congress enacted in 2005 and 2016.²⁵³ The returning-worker exemptions set forth in the SOS Act of 2005 and the Consolidated Appropriations Act of 2016 allowed returning workers—individuals who previously counted against the annual numerical limit during any one of the three prior fiscal years—to receive an H-2B visa that did not count toward the cap limit.²⁵⁴ In other words, the Acts allowed the issuance of additional H-2B visas beyond the annual limit of 66,000 to certain returning workers.²⁵⁵ There were a variety of returning-worker proposals introduced in the 115th Congress,²⁵⁶ such as H.R. 1941, H.R. 2004, H.R. 4207, H.R. 792, and S. 3125 and one in the 116th Congress, H.R. 798.²⁵⁷ The language of H.R. 2004, the Strengthen Employment And Seasonal Opportunities Now (SEASON) Act, provides an accurate representation of the goal of all the returning-worker proposals listed above.²⁵⁸ H.R. 2004 proposed to amend the INA to provide that a returning H-2B temporary nonagricultural worker

who has already been counted toward the applicable numerical limitation during a fiscal year: (1) shall not again be counted toward such limitation during each succeeding consecutive fiscal year in which the alien is issued an H-2B visa or otherwise provided such

250. H.R. 1941, 115th Cong. (2017); H.R. 2004, *id.*; H.R. 4207, *id.*; H.R. 792, *id.*; S. Res. 3125, *id.*; H.R. 2740, 116th Cong. (2019).

251. See BRUNO, THE H-2B VISA, *supra* note 7.

252. *Id.* at 5.

253. See *supra* Section I.D.1.

254. See *supra* Part I.D.1.

255. See *supra* Part I.D.1.

256. The 115th Congress lasted from January 3, 2017, to January 3, 2019.

257. BRUNO, THE H-2B VISA, *supra* note 7, at 5.

258. See generally H.R. 1941 115th Cong. (2017); H.R. 2004, *id.*; H.R. 4207, *id.*; H.R. 792, *id.*; S. Res. 3125; H.R. 798, 116th Cong. (2019).

status, but (2) shall be considered a returning worker.²⁵⁹

However, H.R. 792 adds an additional requirement that states that one is not considered a returning worker if “the alien departs the United States for a period longer than one year, was not counted toward the limitation in any of the three most recent fiscal years, or violated his or her status during the authorized period of stay.”²⁶⁰

Amending the INA to allow a permanent returning-worker provision, as these bills suggest, would cause an outrageous increase in H-2B workers in the United States.²⁶¹ This continuous increase would be the result of additional H-2B workers receiving a returning-worker status each year.²⁶² Once H-2B workers gain this returning-worker status, they can be exempt from the cap for multiple years if they perform consecutive, yearly work in the U.S. under an H-2B visa.²⁶³ Specifically, if the 66,000 new workers who came to work in 2019 return in 2020, DHS could potentially be issuing 66,000 returning-worker visas along with issuing 66,000 to new workers. The statutory cap exists in order to avoid this uncontrollable increase in foreign workers.²⁶⁴ Having a controlled number of H-2B workers entering the U.S. is what Congress intended when it created the cap in 1990, and H.R.792 completely defeats this Congressional purpose.²⁶⁵

2. Quarterly Allocation

In the 116th Congress,²⁶⁶ H.R. 2740, the Labor, Health and Human Services, Education, Defense, State, Foreign Operations, and Energy and Water Development Appropriations Act, 2020 proposed to replace the current semiannual allocation of H-2B visas, as described above, with a type of quarterly allocation.²⁶⁷ This is the same as the sixth proposal DHS made in its 2019 report to Congress.²⁶⁸ However, this bill differed from DHS’s proposal because it added that in quarters in which requests for H-2B workers exceeded the availability of visas, USCIS would allocate H-

259. H.R. 2004, 115th Cong. (2017).

260. H.R. 792, 115th Cong. (2017).

261. *See generally* sources cited *supra* note 250.

262. *Id.*

263. *Id.*

264. *See generally* Rosenblum & Brick, *supra* note 37.

265. *See generally id.*

266. The 116th Congress convened on January 3, 2019, and adjourned on January 3, 2021.

267. BRUNO, THE H-2B VISA, *supra* note 7, at 5.

268. *See discussion supra* Section III.A.6.

2B visas proportionally among employers.”²⁶⁹ Due to the additional allocation requirement, the USCIS would not have to perform a lottery. The proportional allocation would mean that more employers would be receiving some H-2B workers, but many of those employers would likely be receiving less than the number of workers requested. For example, a petitioner may only end up with 20 workers after the H-2B visas are equally proportioned among all approved petitioners even if the petitioner requested 50 workers. Therefore, this bill would actually cause more uncertainty for employers regarding how many of the requested workers they would receive and create an incentive for employers to request more work visas than they actually need.

3. H-2C Proposal

There have been a few bills that propose amending the INA to create the H-2C program.²⁷⁰ The H-2C program would replace the current seasonal H-2A program and provide a hybrid program with agricultural jobs and some occupations that fall under the H-2B program.²⁷¹ The H-2C program would issue visas for agricultural jobs along with jobs for the meatpacking, dairy, and timber industries, all currently covered under the H-2B program.²⁷² The H-2C proposal could potentially provide relief to the issue of high demand for H-2B workers by providing some industries an additional program to find workers.²⁷³ Nevertheless, if the H-2C program were adopted, it would not be the ideal solution to provide relief to employers seeking H-2B workers. First, the bill that proposes the H-2C program specifically focuses on helping provide a brighter future for agriculture and improving the H-2A program, rather than focusing on providing relief to H-2B employers.²⁷⁴ Second, even though the H-2C program would give a different outlet for workers for the meatpacking, dairy, and timber industries, there is no evidence that shows that the 66,000 visas would satisfy the needs of the other industries in need of H-2B workers. For these reasons, the proposal for the H-2C program is not a strong option to rely on for providing a significant change to the H-2B program or providing relief to employers seeking H-2B workers.

269. H.R. 2740, 116th Cong. (2019).

270. *Goodlatte Revises H-2C Immigration Proposal*, TRI-STATE LIVESTOCK NEWS (Feb. 22, 2018), <https://www.tsln.com/news/goodlatte-revises-h-2c-immigration-proposal/> [<https://perma.cc/W8CC-BA4U>].

271. *See id.*

272. *Id.*

273. *See generally id.*

274. *See id.*

In conclusion, implementation of the DHS proposals would still leave employers facing the uncertainty of whether they will be able to receive H-2B workers.²⁷⁵ The DHS proposals do not address the uncontested fact that there is a need for more than 66,000 H-2B workers each year, but instead just focus on different methods for distributing H-2B visas.²⁷⁶ The returning-worker legislative bills lack the restrictions needed to provide adequate regulation of H-2B workers coming to work in the United States.²⁷⁷ The other legislative bills proposed are inadequate because, similar to the DHS proposals, they do not address the need to raise the annual cap.²⁷⁸ Thus, Congress must enact a new provision that will provide relief to employers while still allowing federal agencies to properly regulate H-2B workers entering the United States.

IV. FINDING A BALANCE: A RETURNING-WORKER PROPOSAL

The temporary provisions set forth by Congress, the DOL, and the DHS have provided some relief to employers by allowing USCIS to issue H-2B visas beyond the statutory cap in certain years.²⁷⁹ Nevertheless, statistics show that these provisions have not been enough to provide relief for all employers in need of H-2B workers.²⁸⁰ Many employers are still unable to hire workers through the H-2B program.²⁸¹ Even if employers receive H-2B workers, the uncertainty is negatively affecting business decisions, such as expansion and growth.²⁸² While some legislators have tried to solve the problem with proposed legislation, Congress has been reluctant to pass legislation that would make permanent changes regarding the cap to the H-2B program—specifically changes that will permanently increase the yearly number of H-2B visas being issued.²⁸³ These actions suggest that some legislators in Congress disfavor removing or increasing the limit on the yearly number of H-2B visas. Despite the fact that the statutory cap does not reflect the current needs of U.S. employers, removing the limit of H-2B workers is a bridge too far in Congress's

275. See discussion *supra* Section III.A.

276. See generally Goodlatte *Revises H-2C Immigration Proposal*, *supra* note 270.

277. See *supra* Section III.B.1.

278. See *supra* Section III.B.

279. See generally BRUNO, *THE H-2B VISA*, *supra* note 7.

280. See discussion *supra* Section I.D.

281. See generally U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 4.

282. See generally *id.*

283. See generally BRUNO, *THE H-2B VISA*, *supra* note 7.

eyes.²⁸⁴ The H-2B program is in need of a change to the cap—one that includes a reasonable limit on H-2B visas, reflects the needs of employers, and is able to gain support in Congress.

A. Meeting in the Middle: The Returning-Worker Provision

Congress should amend the INA to include a permanent returning-worker provision that allows H-2B workers who are returning to work for the same employer to be exempt from the cap for a period of two years before having to count toward the cap again. Under this proposal, H-2B workers working in the United States would have the opportunity to leave and then return to work for the same employer over a period of three years while only being counted against the cap in the first year. For example, if granted an H-2B visa to start work on April 1, 2020, the H-2B worker could work for the time specified and apply to return for another work period without counting against the cap until April 1, 2023. U.S. employers wishing to re-hire H-2B workers would also be required to specifically name the individual in the petition in order for the worker to obtain a cap-exempt visa. The H-2B worker would lose the privilege of having a returning-worker status if the worker: (1) departs from the United States for a period longer than one year or (2) violates his or her status during the authorized period of stay.

The returning-worker provision stems from existing regulations in the H-2B program.²⁸⁵ Under the existing H-2B program, an employer can apply to extend an H-2B worker's stay in increments of up to one year.²⁸⁶ New employers can also submit an application to the DHS to ask permission to extend the stay of H-2B workers in the United States in order to work for their company.²⁸⁷ Despite the opportunity for extensions of stay, an alien's total period of stay as an H-2B worker may not exceed three consecutive years.²⁸⁸ H-2B workers who have spent three years in the United States may not seek an extension of stay or gain readmission to the United States as an H-2B worker until they have been outside the country for 90 days.²⁸⁹ The proposed returning-worker provision would allow H-2B workers who do not choose to extend their initial stay to submit an application to come back to work within a period of three years

284. *See generally id.*

285. *See generally id.*

286. BRUNO, H-2A AND H-2B, *supra* note 2, at 8.

287. *Id.*

288. *Id.*

289. *Id.*

from their first admission date without being counted toward another annual cap.

The returning-worker provision also reflects previous temporary returning-worker provisions such as the SOS Act of 2005 and the Consolidated Appropriations Act of 2016.²⁹⁰ As previously discussed, U.S. legislators have proposed bills to adopt the returning-worker exemption set forth in the SOS Act and Consolidated Appropriations Act but to make it permanent rather than temporary.²⁹¹ However, if Congress would make the returning-worker provisions set forth in these Acts permanent, once a returning-worker is exempt from the cap that individual could continue to come back to work in the U.S. year to year without counting toward the cap.²⁹² Further, if Congress would have passed the bills that proposed a permanent returning-worker exemption, H-2B workers who obtain a returning-worker status could potentially be cap exempt for life if they come to work every consecutive fiscal year.²⁹³ The ability for H-2B workers to be cap exempt for life would cause a continuous increase in the number of H-2B workers in the United States.²⁹⁴ This continuous increase would make it difficult for the USCIS to limit how many H-2B visas it issues to workers yearly. Though this Comment's proposed returning-worker provision is a "permanent" exemption, it only allows a returning-worker to be exempt for two years before having to count toward the cap again. This two-year requirement ensures that there will not be a continuous increase of H-2B workers, therefore allowing the USCIS to have more control over the yearly number of H-2B visas issued.

The proposed returning-worker provision outdoes previous proposals for three reasons. First, it does not require significant changes to the H-2B program. The only change that this proposal requires is one to the application process: U.S. employers will have to provide the returning worker's name in the application in order to receive an H-2B cap-exempt visa. Second, this proposal relieves uncertainty as it guarantees that U.S. employers will receive some of their previous workers if the employers and employees abide by the guidelines of the H-2B program. Third, the proposed provision allows economic growth for all businesses who are in need of H-2B workers. By making more H-2B visas available, employers

290. *See supra* Part I.

291. *See discussion supra* Section III.B.1.

292. *See discussion supra* Section III.B.1.

293. *See generally* H.R. 1941 115th Cong. (2017); H.R. 2004, *id.*; H.R. 4207, *id.*; H.R. 792, *id.*; S. Res. 3125; *see generally* H.R. 798, 116th Cong. (2019); *see discussion supra* Section III.B.1.

294. *See discussion supra* Section III.B.1.

will have a better chance to recruit H-2B workers when needed, allowing businesses to function and potentially grow.

Considering the history of proposed legislation not gaining support in Congress, some legislators may criticize this returning-worker provision as being too broad. If this is the case, the returning-worker provision can be narrowed by adding an additional requirement—the exemption would only apply to workers returning to work in food industries instead of all industries falling under the H-2B program. As previously discussed, employers in food industries are at a greater risk when not receiving H-2B workers because they are unable to put off work until a later time as some industries, such as the construction industry, are able to do.²⁹⁵ If the returning-worker provision must be narrowed in order to gain support in Congress, it should be done in a way that first prioritizes food industries.

B. Not Causing Significant Change to the Overall H-2B Program

Allowing additional H-2B visas beyond the statutory cap would make it difficult to keep track of H-2B workers and those aliens who never return to their country.²⁹⁶ The returning-worker provision follows DHS's reasoning for adding the returning-worker requirement for the 2019 provision.²⁹⁷ The idea is that returning workers have generally demonstrated the willingness to return home after they completed their temporary labor or service or period of authorized stay.²⁹⁸ The returning-worker provision provides a basis to believe that H-2B workers would likely return home again after another temporary stay in the U.S.

This proposal also addresses another criticism: expanding the yearly number of H-2B visas will give employers an opportunity to hire foreign workers over American workers. The current application process sets forth protections to ensure that foreign workers are a response to legitimate market demands and their presence does not undermine employment opportunities of U.S. workers.²⁹⁹ Currently, employers who petition for H-2B workers have to show the DOL that they tried to recruit U.S. workers

295. See discussion *supra* Section II.B.2.

296. See generally Exercise of Time-Limited Authority to Increase the Fiscal Year 2019 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program, 84 Fed. Reg. 20005, 20008 (May 8, 2019) (to be codified at 8 C.F.R. pt. 214).

297. See *supra* Section I.D.2.

298. Exercise of Time-Limited Authority to Increase the Fiscal Year 2019 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program, 84 Fed. Reg. at 20008.

299. Johnson, *supra* note 159.

and that there are not sufficient U.S. workers who are qualified and who will be available to perform the temporary services or labor.³⁰⁰ Employers do so by complying with the the DOL's Pre-Certification Recruitment Activities requirement, which consists of the employer advertising the job to Americans for a certain period of time.³⁰¹ Employers are not approved to hire H-2B workers unless the the DOL determines that there are no U.S. workers available to perform the job.³⁰² Raising the yearly number of H-2B visas would not give more employers an opportunity to pass up American workers because the application process would remain the same under this proposal. The proposed returning-worker provision is not intended to change the H-2B program as a whole but rather to strike a balance between competing interests. This balance is needed in order to gain enough support from Congress so that it will enact a permanent solution to this problem that has plagued the U.S. for over 15 years.

C. *Striking a Balance*

Overall, the returning-worker proposal strikes a balance between providing relief to U.S. employers and curtailing an uncontrollable increase in the issuance of H-2B visas. Unlike other proposals that would cause an uncontrollable increase due to a lack of restrictions on workers gaining returning-worker status,³⁰³ this provision would provide regulation of returning workers by requiring an individual to count toward the cap after holding a returning-work status for two years. This regulation would allow more H-2B visas to be issued, while having greater restrictions than the proposals Congress has rejected.³⁰⁴ This provision prioritizes those that have a history of needing H-2B workers by allowing workers they have already used to return without being subject to the cap. The proposal can be seen as a self-regulating cycle that will reward employers who have a continuous need for H-2B workers and also reward H-2B returning workers who comply with the regulations of the H-2B program.

300. See discussion *supra* Section I.C.1.

301. See *H-2B Temporary Non-agricultural Program*, *supra* note 60.

302. See discussion *supra* Section I.C.1.

303. See discussion *supra* Section III.B.1.

304. See discussion *supra* Section III.B.

CONCLUSION

Since 2005, the H-2B statutory cap has not met the needs of U.S. employers seeking H-2B workers.³⁰⁵ As a result, some employers receive a smaller number of H-2B workers than petitioned for, receive workers at a later start date than requested, or in some cases, do not receive any H-2B workers at all.³⁰⁶ Specifically, this has taken a negative toll on businesses that heavily rely on the H-2B program to find workers because those businesses are unable to open or expand without employees.³⁰⁷ Despite Congress and federal agencies taking different measures to provide for the issuance of H-2B visas or granting of H-2B status beyond the statutory cap, these temporary measures have not had the effect necessary to meet employers' needs for H-2B workers.³⁰⁸ In turn, many businesses still face the danger of suffering irreparable harm due to a lack of available temporary nonagricultural workers.³⁰⁹

Congress has hesitated to adopt proposed legislation to solve this issue,³¹⁰ but it is past time to amend the INA to provide exceptions to the statutory cap. The H-2B program needs a permanent provision that strikes a balance between providing relief to U.S. employers while having an increased limit that will be favored by the majority of members in Congress.³¹¹ By adopting the returning-worker provision proposed in this Comment, this balance can be achieved. If adopted, Earl Fontenot will have the comfort of knowing that he has a greater chance of receiving an approved petition from the USCIS for those workers returning to his crawfish processing plant. Even though returning workers will have to count against the cap again every three years, employers will have a greater opportunity to obtain visas under the cap considering not all of the employers petitioning for workers will be relying on the 66,000 limit. Overall, the returning-worker provision will benefit employers petitioning for returning workers and employers petitioning for H-2B workers under the statutory cap. Amending the INA to include the permanent returning-worker provision would provide the necessary cap increase, allowing employers to rely on the H-2B program instead of leaving the fate of their businesses up to chance.

305. See U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 4.

306. See *id.*

307. See *generally id.*

308. See *generally* BRUNO, THE H-2B VISA, *supra* note 7.

309. See *generally* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 4.

310. See *generally* BRUNO, THE H-2B VISA, *supra* note 7.

311. See discussion *supra* Section IV.C.