

U.S HOUSE COMMITTEE ON EDUCATION & LABOR
SUBCOMMITTEE ON WORKFORCE PROTECTIONS

Hearing on

“Second Class Workers: Assessing H2 Visa Programs Impact on Workers”

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WRITTEN TESTIMONY OF LEON R. SEQUEIRA

Good morning Chairwoman Adams, Ranking Member Keller, and members of the Subcommittee. I appreciate the invitation to testify today about the H-2A and H-2B guestworker programs.

I am an attorney in private practice and a significant part of my work involves providing advice and counsel to employers of H-2A and H-2B guestworkers. My clients range in size from small family farms with only a handful of employees to large businesses and family farming operations with thousands of employees. Let me begin by noting that I am testifying today in my personal capacity and not on behalf of any client.

I have worked on employment and immigration policy and related issues for nearly 20 years, including as a staffer in the U.S. Senate, as an Assistant Secretary of Labor in the George W. Bush administration, and for more than a decade advising clients in private practice.

The H-2A and H-2B programs were created by Congress in 1986 through an amendment to Immigration and Nationality Act that divided the predecessor single H-2 visa program into two programs for employers with a temporary or seasonal need for labor. *See* 8 U.S.C. § 1101(a)(15)(H)(ii), (b); Pub. L. 99-603, 100 Stat. 3359 (1986). The H-2A program is for employers with a temporary need for *agricultural* labor and the H-2B program is for employers with a need for temporary *non-agricultural* labor.

Congress designed the H-2A and H-2B programs, first and foremost, as domestic worker protection programs. That is, before any employer can employ a foreign guestworker, the U.S. government must first determine that employment of the foreign worker will not have an adverse impact on any U.S. workers or their working conditions.

Therefore, by definition, if an employer hires an H-2A or H-2B guestworker, the U.S. government has already conclusively determined that the guestworker does not harm U.S. workers or working conditions. Certainly, some people may have complaints about foreign guest worker programs for one reason or another, but it is simply not true that the H-2A and H-2B guestworker programs harm U.S. workers by taking U.S. workers’ jobs or putting downward pressure on wages and working conditions.

In the H-2A and H-2B programs, Congress built-in processes to ensure that employment of foreign workers does not harm U.S. workers.

First, the U.S. Department of Labor sets the hourly wage rate that every employer must pay to the guestworker, and to any U.S. worker performing the same job. In the H-2A program, this wage is called the Adverse Effect Wage Rate. The H-2A wage rate is set by the Department of Labor each year for various regions around the country based on wage survey data collected by USDA. Currently, the H-2A wage rate varies from \$17.51 an hour in California to \$11.99 per hour in the Southeast, or just over \$15 per hour on average nationwide.

In the H-2B program, the Department of Labor requires that employers apply to the Department to obtain a “prevailing wage determination” for the particular job. DOL assigns specific wages to each non-farm occupation by geographic location based on data collected and analyzed by the Bureau of Labor Statistics through the Occupational Employment and Wage Statistics program.

The second way that the Department of Labor ensures that employment of an H-2A or H-2B guest worker will not adversely affect U.S. workers is by evaluating the labor market and certifying in writing that there are not a sufficient number of U.S. workers who want to take the job that the employer is trying to fill.

The Department of Labor makes that determination after a period of required advertising of the job both by the state department of labor in the state where the work will take place, as well as through nationwide online advertising by the U.S. Department of Labor. Any able, qualified and available U.S. worker who applies for the employer’s job must be hired. Only after the employer reports the results of the recruitment efforts and after the Department evaluates the employer’s compliance with all other application requirements, including proving that the job opportunity is temporary, does the Department of Labor issue a labor certification to the employer.

Any U.S. workers hired in response to the employer’s advertising are deducted from the total number of positions for which the employer is seeking certification. Thus, if an employer has 20 positions to fill and 2 U.S. workers are hired, then the Department of Labor would certify that the employer has 18 positions eligible to be filled by guestworkers. And if an employer’s application fails to meet the standards for approval, it will be denied. After obtaining a labor certification from the Department of Labor, the employer then has to apply to the Department of Homeland Security and prove again that it is offering a temporary job and has been unable to hire a sufficient number of U.S. workers.

In sum, the federal government actually checks twice – through two different application processes to two federal agencies – to ensure that an employer has a legitimate need to hire temporary foreign labor and that employment of the foreign worker will not harm U.S. workers.

In Fiscal Year 2021, there were more than 16,300 H-2A applications filed and about 95% were certified by the Department of Labor. In the H-2B program that year, there were about 9,800 applications filed and about 87% were certified. Over the past five years, there has been more than a 59% increase in H-2A applications. In the H-2B program during that time there has been a 35% increase in applications. The increase in interest in both programs reflects the continuing

extreme shortage of available U.S. workers willing to fill temporary and seasonal jobs. This trend has existed for decades and has only exacerbated during the pandemic.

In addition to the definitive government determination that the employment of guestworkers does not adversely affect U.S. workers, simple math makes clear that guestworkers are a miniscule part of the overall economy, though vitally important to numerous businesses with seasonal labor needs. There are 158 million people employed in the U.S. economy today. In fiscal year 2021, the combined number of H-2A and H-2B visas issued by the State Department was just under 353,000 – or just 0.22 percent of all workers in the economy.

Nearly 258,000 of the 353,000 are H-2A workers. According to the USDA Farm Labor Survey of wages paid by farmers – which is the utilized to set the H-2A wage rate – there are about one million hired farmworkers in the U.S. in any given year. Other USDA reports indicate there are about 2.4 million farmworkers in the U.S.¹ In 2021, 258,000 individuals received an H-2A visa, so H-2A workers make up anywhere from about 10 to 25 percent of farm employment. But the employment of the H-2A farm workers has not adversely affected domestic wages. The mandatory wage rate in the H-2A program has increased dramatically in recent years, far outpacing the general rate of inflation. In some states, H-2A wages have increased more than 40% in the past five years, with some states seeing 15 or 20% increases in a single year.

Likewise, studies have shown that the employment of H-2B workers does not depress the wages of U.S. workers and that H-2B workers do not take jobs from their U.S. counterparts. Rather, employment of H-2B workers correlates with higher employment and higher wages in the local economy. See Madeline Zavodny, PhD, *The Economic Impact of H-2B Workers*, U.S. Chamber of Commerce, 2010.

Rather than being treated less-favorably than domestic workers, guestworkers are afforded numerous benefits and protections that other U.S. workers in the economy do not receive. For example, the Department of Labor requires employers to pay guestworkers costs to travel to the U.S. to begin work. Federal law does not otherwise require employers to pay costs for workers who accept employment beyond commuting distance from their home.

In the H-2A program, the Department of Labor requires employers to provide free housing to workers. In addition, employers are also required to provide free daily transportation to and from the worksite. All of these benefits are significant financial investments for agricultural employers that other workers in the economy typically do not receive. Indeed, even local U.S. farmworkers have to pay for their own housing and daily transportation to and from work. The Department of Labor also requires H-2A and H-2B employers to guarantee that workers will be paid for three-fourths of the work hours described in the application – another benefit that other employers in the economy are not required to provide to their workforce.

Some critics even claim that H2 workers are somehow “trapped” and cannot leave their employer, but such claims are simply not true. Guestworkers are free to change from one H-2

¹ The discrepancy is likely the result of the way in which data is collected, analyzed and reported. That is, each farm employer reports the number of workers they hire, and many farmworkers are employed by more than one farm during the year.

employer to another, and thousands do so every year. Of course, there is an orderly process involved in transferring from one employer to another. Any employer of a guestworker must possess an approved labor certification and must file the appropriate transfer paperwork with the Department of Homeland Security to hire an H-2 worker, but scores of employers and workers complete that process every year. No H-2A or H-2B guestworker is required to continue working some place they do not want to work.

H-2A and H-2B workers may be the most protected workers in the entire economy. No fewer than four federal Departments (and several more agencies within those Departments) enforce the specific requirements of federal laws pertaining just to the employment of guestworkers. These agencies routinely conduct random and complaint-based audits and investigations of employers: the Department of Labor, the Department of Homeland Security, the Department of State, and the Department of Justice. In addition, various state agencies also regularly enforce state law requirements pertaining to guest workers. And, of course, other general employment and health and safety laws (both federal and state) also apply to H-2A and H-2B employers and workers.

Besides the efforts aimed at employers to ensure compliance, guestworkers themselves are repeatedly educated about their rights, beginning with a written disclosure of the terms of employment before they can even obtain a visa. Then, as part of the visa issuance process, the State Department provides every recipient of a visa with a booklet explaining their rights and providing a phone hotline to report complaints. The pamphlets are printed in more than four dozen languages. See <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/temporary-workers.html>.

At the worksite, employers are required to display Department of Labor posters advising workers of their rights and providing a phone hotline number to report complaints. Attached at the end of my testimony is a list of just some of the many materials the federal government provides to guestworkers advising them of their rights while working in the United States. In addition, so-called “outreach workers” from labor unions, advocacy groups and even plaintiffs’ lawyers also have access to guestworkers to advise them of their rights. Indeed, in the H-2A program, employers are even required to guarantee access for outreach workers to visit guestworkers in their employer-provided housing.

In addition to all of these efforts by multiple U.S. Government agencies, employers and outreach workers to educate workers about their rights, state government agencies also conduct their own outreach, education and enforcement efforts to advise guestworkers of their rights and how to file complaints. For example, Washington State, which has one of the largest populations of H-2A guestworkers, regularly conducts outreach and enforcement efforts visiting farms and distributing literature to workers explaining their rights. See H-2A Guest Workers’ Guide to Washington State Workplace and Safety and Rights <https://www.lni.wa.gov/forms-publications/F101-197-000.pdf>.

And workers themselves possess what is perhaps the best protection of all to ensure they can get help or advice whenever they want if they believe their employer is not following the law – a cell phone. Virtually every guestworker has at least one cell phone and can easily seek out advice or

assistance from these various state and federal government agencies and outreach workers if they have concerns about their employment situation.

There is no shortage of people and government agencies ready to assist guestworkers in asserting their rights. But that is not to say that even with all of these precautions in place, some workers end up working for employers who do not follow the law. Employers who willingly ignore their obligations to workers should be investigated and should be held liable. The Department of Labor regularly recovers back wages for workers who were shorted pay, and the Department imposes civil money penalties against employers who violate the rules, and even debars from the program employers who commit egregious violations. Enforcement data from the Department of Labor confirms that these processes work.

Every year, the Wage and Hour Division of the Department of Labor conducts more than a thousand investigations of H-2 employers and analysis of that data by the Employment Policy Institute reveals a relatively small number of employers is responsible for the vast majority of violations. See Daniel Costa, et al., *Federal Labor Standards Enforcement in Agriculture*, Employment Policy Institute, 2020. In addition, the Employment and Training Administration at the Department of Labor conducts their own audits of hundreds, if not thousands of H-2A and H-2B employers each year, although they do not publicly report the results of their audits.

In 2019, there were 431 cases with H-2A violations and 4,994 workers who received back pay averaging \$485. In 2019, there were more than 12,600 H-2A applications approved by the Department of Labor and there were nearly 205,000 individuals obtained an H-2A visa. Thus, employers with H-2A violations were 3 percent of all H-2A applications and just over 2 percent of H-2A workers were due back wages. When that enforcement data is placed in context, it readily apparent that the overwhelming number of employers follow the law, treat their employees with respect with and provide the pay and benefits those employees are due.

There will always be cases of employers who do not comply with the requirements of the H-2A or H-2B programs. Just like employers in any other sector of the economy or in any other area of life, there are always a small number of people who do not follow the rules. This is true even in Congress. Just because some members of Congress violate the law, we do not (or most of us do not) automatically conclude that all members of Congress are crooks.

Guestworkers who come to the U.S. legally, who are paid government mandated wages, live in housing with government-mandated standards (for H-2A), who have travel costs and transportation paid, who pay taxes and who return home at the end of the season are critically important to the seasonal businesses that rely on them. Their employment does not harm U.S. workers.

By comparison, there are millions of people who have entered the U.S. illegally and who compete with U.S. workers in the economy. According to data from Customs and Border Protection, so far in just eight months of fiscal year 2022, more than 1.5 million people have been caught illegally crossing the border with another 440,000 people known to have gotten away. That means in just eight months nearly 2 million people have illegally crossed the border in the U.S. – that we know about. Who knows how many additional scores of people made it

into the U.S. undetected? Just the number of illegal border crossers known to have gotten away in the last eight months far exceeds the total number of H-2A and H-2B guest workers who are legally admitted – and then return home – each year.

The Department of Labor has recognized that it is the illegally documented workforce that poses the greatest threat the wages and working conditions of U.S. workers – not guestworkers who are in the country legally on a temporary work visa. Notably, the Department of Labor recognized this more than a decade ago when there were estimated to be about 12 million workers illegally present in the U.S. That was long before anyone could have imagined the chaos that now exists at our southern border with huge numbers of people illegally crossing the border each month and the population of people illegally present in the U.S. estimated by some to be 15 million or more. As the Department of Labor concluded in a 2008 rulemaking discussing studies by the GAO, scholars such as Philp Martin, PhD, and comments from farmworker advocacy organizations, “all of the information available to the Department strongly indicates that the presence of large numbers of illegal, undocumented workers in the agricultural sector poses a much greater potential threat to the wages of U.S. workers than guest workers do.” 73 Fed. Reg. 77110, 77170 (Dec. 18, 2008).²

While the H-2A and H-2B guestworker programs are far from perfect – no government program ever is – they are the only means the U.S. government has provided to employers to fill temporary and seasonal positions when there are insufficient numbers of U.S. workers willing, able and available to take available jobs. These guestworker programs are a critical lifeline to thousands of farms and businesses across the country with a temporary or seasonal need for labor each year.

The H-2A and H-2B guestworker programs are highly regulated and provide good jobs enabling workers to learn skills, gain experience and earn a significant amount of money to support their families abroad. It is worth noting that the general minimum wage in Mexico has been rapidly increasing in recent years, but in 2022 is only about \$8.41 per day – or about \$1.05 per hour for an 8-hour work day. The average H-2A wage rate is nearly fifteen times the Mexican minimum wage, so it is no wonder that workers from Mexico and beyond want to come to the U.S. to work. But U.S. government policy should ensure that job seekers enter the country and return home at the end of the season through a regulated, orderly and legal process. The H-2A and H-2B programs establish just such a process that provides important protections to both foreign and U.S. workers.

Should this committee want to explore balanced ways to improve the operation of the H-2A and H-2B programs for the benefit of workers and for employers, there would be many in the employer community willing to participate in that effort. Thank you again for the opportunity to testify today.

² The Department further explained, “[t]he U.S. Supreme Court has also noted the threat that undocumented workers pose to the wages and working conditions of U.S. workers. *See Sure-Tan v. NLRB*, 467 U.S. 883, 892 (1984) (“acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens * * *”).” 73 Fed. Reg. 77110, 77170 (Dec. 18, 2008).

The State Department provides visa recipients with a booklet explaining their rights.

Know Your Rights

<https://travel.state.gov/content/dam/visas/LegalRightsandProtections/Wilberforce/Wilberforce-ENG-100116.pdf>

<https://travel.state.gov/content/dam/visas/LegalRightsandProtections/Wilberforce/Wilberforce-SPA-1242017.pdf>

The Department of Labor also advises guestworkers of their rights through videos played on continuous loop in consulates. <https://www.dol.gov/agencies/whd/resources/videos/know-your-rights>

The Department of Labor distributes numerous flyers, booklets, cards and brochures to H-2A and H-2B guestworkers advising them of their rights and providing a phone hotline to report complaints.

Key Protections for H-2A Workers

https://www.dol.gov/sites/dolgov/files/WHD/h2a/key-protections-h2a_Spanish.pdf;

<https://www.dol.gov/sites/dolgov/files/WHD/h2a/key-protections-h2a.pdf>

Key Protections for H-2B Workers

<https://www.dol.gov/sites/dolgov/files/WHD/posters/key-protections-h2b.pdf>

Employee Rights for H-2B Workers COVID-19

https://www.dol.gov/sites/dolgov/files/WHD/posters/H2B_COVID.pdf

https://www.dol.gov/sites/dolgov/files/WHD/posters/H2B_COVID_SPA.pdf

H-2A for U.S. Workers

<https://www.dol.gov/sites/dolgov/files/WHD/publications/WH1401.pdf>

<https://www.dol.gov/sites/dolgov/files/WHD/publications/WH1401SPA.pdf>

Protections for US Workers Under the H-2B Program

<https://www.dol.gov/sites/dolgov/files/WHD/publications/WH1400.pdf>

H-2A Worker Rights Card

<https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/H2AEnglish.pdf>

<https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/H2ASpanish.pdf>

H-2B Worker Rights Card

<https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/WH1399.pdf>

<https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/WH1399SPA.pdf>

Farm Worker Rights

https://www.dol.gov/sites/dolgov/files/WHD/publications/Farm_Worker_Rights_Flyer.pdf

The Department of Labor of also requires H-2A and H-2B employers to post specific notices at the worksite advising employees of their rights and providing a phone number to report complaints.

Employee Rights Under the H-2A Program

https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/WHD1491Eng_H2A.pdf

https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/WHD1491Span_H2A.pdf

Employee Rights Under the H-2B Program

<https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/H2B-eng.pdf>

<https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/H2B-span.pdf>