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RESPONSES TO QUESTIONS  
OF THE NATIONAL ADMINISTRATIVE OFFICE OF MEXICO

REGARDING

PUBLIC COMMUNICATION MEX 2005-1  
(RIGHTS OF MIGRANT WORKERS WITH H2-B VISAS)  
UNDER THE NORTH AMERICAN AGREEMENT ON LABOR COOPERATION

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## Introduction

In this submission, petitioners provide their responses to questions that the National Administrative Office (“NAO”) of Mexico posed to the NAO of the United States, on October 12, 2007, under the North American Agreement on Labor Cooperation (“NAALC”). The Mexican NAO’s questions focus on whether temporary workers present in the United States on H-2B temporary visas are receiving the protections of U.S. labor laws.

In short, these workers are unprotected. As set forth below, the two federal agencies responsible for protecting these workers refuse to undertake this duty. One of these agencies, the U.S. Department of Labor, is engaged in a new regulatory initiative to further reduce its responsibility. And many of the workers themselves are unable to litigate to protect their own labor rights.

More specifically, although two federal agencies administer the H-2B program -- the United States Department of Labor and the United States Department of Homeland Security -- neither agency currently accepts responsibility for such routine enforcement responsibilities as: i) verifying employers’ claims regarding the wages, hours, job responsibilities and other terms of employment they intend to offer workers, prior to authorizing those employers to bring H-2B workers into the country, ii) denying certification to employers who abuse workers’ statutory rights, iii) conducting affirmative investigations to ensure that the employers are living up to their promises, obeying the statutory wage and hour laws, and honoring other worker protections, and, iv) pursuing workers’ express complaints that employers are violating contractual obligations.

Moreover, although the U.S. Department of Labor does pursue some worker complaints regarding statutory wage and hour violations, it is slow to act, does not make accommodations for the workers’ isolation, language limitations and mobility, and fails to take any steps to reform the H-2B program in response to repeated violations. And, even though the Department’s current efforts are inadequate to protect the statutory rights of H-2B workers, the Department has proposed regulations that would further weaken its ability to protect the rights of those workers.

Nor do individual H-2B workers have the capacity to enforce their own labor rights through litigation. Theoretically, when federal agencies fail to enforce the laws, U.S. workers can file lawsuits to protect their rights. However, this is virtually impossible for many H-2B workers. One problem is that there is no federal right of action to enforce the terms of an H-2B worker’s contract. Another is that H-2B workers are categorically ineligible, by operation of U.S. law, to receive legal assistance from law offices that receive any of their funding from the federal Legal Services Corporation. In many parts of the country, no other lawyers possess the expertise and willingness to represent H-2B workers. Most H-2B workers without access to a lawyer cannot file a lawsuit, because they cannot speak English, do not understand the U.S. legal system, live in isolated areas, and have to leave the country at the termination of their employment.

The inability of H-2B workers to enforce their labor rights in the United States violates the NAALC. The NAALC is a labor side agreement to the North American Free Trade Agreement entered into by the United States, Mexico and Canada. Its stated objectives include: to “promote compliance with, and effective enforcement by each Party of, its labor law,” and to “foster transparency in the administration of labor law.”

The Mexican NAO has inquired whether the United States is in compliance with the following provisions of the NAALC:

- 1) Article 4, which, among other things requires the United States to ensure “that [persons with a legally recognized interest under its law] may have recourse to, as appropriate, procedures by which rights arising under its labor law, including in respect of occupational safety and health, employment standards, industrial relations and migrant workers . . . can be enforced,” and “that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial, judicial or labor tribunals for the enforcement of [United States] labor law.”
  
- 2) Article 5, which, among other things, requires the United States to:
  - ensure that its administrative, quasi-judicial and labor tribunal proceedings for the enforcement of its labor law are fair, equitable and transparent and, to this end, . . . provide that: . . . the parties to such proceedings are entitled to support or defend their respective positions and to present information or evidence; and such proceedings are not unnecessarily complicated and do not entail unreasonable charges or time limits or unwarranted delays.
  
- 3) Labor Principle 4, which commits the United States to promote “[t]he prohibition and suppression of all forms of forced or compulsory labor, except for types of compulsory work generally considered acceptable by the Parties, such as compulsory military service, certain civic obligations, prison labor not for private purposes and work exacted in cases of emergency.”
  
- 5) Labor Principle 6, which commits the United States to promote “[t]he establishment of minimum employment standards, such as minimum wages and overtime pay, for wage earners, including those not covered by collective agreements.”
  
- 6) Labor Principle 7, which commits the United States to promote “[e]limination of employment discrimination on such grounds as race, religion, age, sex or other grounds, subject to certain reasonable exceptions, such as, where applicable, *bona fide* occupational requirements or qualifications and established practices or rules governing retirement ages, and special measures of protection or assistance for particular groups designed to take into account the effects of discrimination.”
  
- 7) Labor Principles 9 and 10, which commit the United States to promote “[p]rescribing and implementing standards to minimize the causes of occupational injuries and

illnesses.” and “[t]he establishment of a system providing benefits and compensation to workers or their dependents in cases of occupational injuries, accidents or fatalities arising out of, linked with or occurring in the course of employment.”

The instant filing supplements the petition and memorandum of law filed in 2005 with the Mexican NAO, under the North American Agreement on Labor Cooperation, by “petitioners” -- H-2B workers and certain organizations in the United States and Mexico -- and the addendum that petitioners filed in 2006, describing the facts of additional H-2B workers unable to enforce their labor rights. The 2005 petition and 2006 addendum are jointly titled, “Public Communication Mex 2005-1 (rights of migrant workers with H2-B visas).” Today’s filing responds to the 69 sets of detailed questions that the Mexican NAO posed to the U.S. NAO concerning petitioners’ allegations. This filing is submitted in direct response to the invitation presented to petitioners by Claudia Anel Valencia Carmona, Esq., Subcoordinator of Hemispheric Labor Politics at the Mexican Secretary of Labor and Social Promotion, by letter dated, October 24, 2007. Petitioners anticipate that the U.S. NAO will submit its own response.

## H-2B Visa Programs

*1(a). What is the local and/or federal legislation that describes the rights of workers with H-2A and H-2B visas?*<sup>1</sup>

### Federal law

The main federal laws that establish rights applicable to workers with H-2A and H-2B visas are summarized below.

A. The federal law that created the H-2A and H-2B programs, the **Immigration Reform and Control Act of 1986 (IRCA)**,<sup>2</sup> and the regulations promulgated pursuant to it, establish certain rights for H-2A workers, and significantly more limited rights for H-2B workers.

1. The following rights are applicable to H-2A workers only:

a. *Wages*: The wage or rate of pay must be the same for H-2A workers as it is for U.S. workers. All workers doing the work covered by the H-2A contract must be paid the highest of the following wages:

i. Regardless of whether workers are paid on an hourly basis, or on the basis of a piece rate, the wages paid must equal an hourly rate at least as high as the applicable “adverse effect wage rate,”<sup>3</sup> the federal or state minimum wage, or the applicable “prevailing wage rate,”<sup>4</sup> whichever is higher.<sup>5</sup>

ii. If it is the prevailing practice in the local area and the particular type of crop activity to pay workers on a piece rate basis, workers must be paid by piece rate and must receive at least the “prevailing piece rate” in the area for the same crop and/or activity.<sup>6</sup> If the piece rate does not result in average hourly piece rate earnings during the pay period at least equal to the amount the worker would have earned had the worker been paid at the hourly rate, then the worker’s pay must be supplemented so that it reaches the equivalent hourly level.

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<sup>1</sup> The questions raised by the NAO of Mexico are set forth, in their original form, in bold font, with their original numbering preserved. Petitioners’ responses are set forth in normal font.

<sup>2</sup> 8 U.S.C. § 1101 *et seq.*

<sup>3</sup> The adverse effect wage rate is established every year by the U.S. Department of Labor for every state except Alaska. It is the average hourly rate received by all stock and field workers in the region in the prior year, as reported in a survey. *United Farmworkers of America, Inc. v. Chao*, 227 F.Supp.2d 102 (D.D.C. 2002); 20 C.F.R. § 655.107(a).

<sup>4</sup> The U.S. Department of Labor defines the “prevailing wage rate” as the average wage paid to similarly employed workers in the same occupation and area of intended employment. 20 C.F.R. § 655.107(b).

<sup>5</sup> 20 C.F.R. § 655.102(b)(9).

<sup>6</sup> 20 C.F.R. § 655.102(b)(6)(ii). The “prevailing piece rate” and “prevailing practices” are determined by the State Workforce Agency.

- b. *Records*: The employer must keep accurate records with respect to a worker's earnings. On each payday, the worker must be provided with a complete statement of hours worked and related earnings. The employer must pay the worker at least twice monthly, and must pay more frequently if it is the prevailing practice to do so.<sup>7</sup> The employer must provide a copy of a work contract or the job order to each worker.<sup>8</sup>
- c. *Three-fourths guarantee*: The employer must guarantee that it will offer each worker employment for at least three-fourths of the workdays in the work contract period and any extensions. If the employer offers less employment, then the employer must pay the amount that the worker would have earned had the worker been employed the guaranteed number of days.<sup>9</sup>
- d. *Housing*: The employer must provide free housing to all workers who are not reasonably able to return to their residences each day. Such housing must be inspected and approved according to appropriate standards. Housing provided by the employer that was constructed after April 1980 must meet the full set of Department of Labor Occupational Safety and Health Administration (OSHA) standards set forth at 29 C.F.R. 1910.142. For housing constructed before April 1980, the person who owns or controls the housing may elect to comply with either the OSHA standards or the U.S. Department of Labor Employment and Training Administration standards set forth at 20 C.F.R. § 654.404 et seq.<sup>10</sup> Rental housing that meets local or state health and safety standards also may be provided.<sup>11</sup>
- e. *Transportation*: The employer is responsible for paying for the workers' transportation under the following circumstances:
  - (1) After a worker has completed 50% of the work contract period, the employer must reimburse the worker for the cost of transportation and subsistence from the place of recruitment to the place of work, if such costs were borne by the worker;
  - (2) For any worker who is provided housing, the employer must provide free transportation between the employer's housing and the worksite; and

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<sup>7</sup> 20 C.F.R. § 655.102(b)(8), (10).

<sup>8</sup> 20 C.F.R. § 655.102(b)(14).

<sup>9</sup> 20 C.F.R. § 655.102(b)(6).

<sup>10</sup> 29 C.F.R. § 500.132(a).

<sup>11</sup> 8 U.S.C. § 1188(c)(4); 20 C.F.R. § 655.102(b)(1).

(3) Upon completion of the work contract, the employer must pay for a worker's subsistence and return transportation to the place of recruitment.<sup>12</sup>

When the employer reimburses the employee's transportation costs, it must do so at a rate no less than the most economical and reasonable similar common carrier transportation charges for the distances involved.<sup>13</sup>

In addition to the above requirements, because employers must pay at least the minimum wage under the Fair Labor Standards Act, if deducting from the first week's wages the costs of transportation paid by the worker to the worksite would cause the hourly wages to fall below required minimum hourly wage levels, then the worker must be reimbursed for those costs in his first wage payment to the extent necessary to bring net wages up to the required minimum level.<sup>14</sup>

- f. *Meals*: The employer must provide either three meals a day to each worker or free and convenient cooking and kitchen facilities for workers to prepare their own meals. If meals are provided, then the employer may charge each worker a certain amount per day for the three meals.<sup>15</sup>
- g. *Workers' compensation insurance*: The employer must provide workers' compensation insurance where it is required by state law. Where state law does not require it, the employer must provide equivalent insurance for all workers.<sup>16</sup>
- h. *Provision of tools and supplies*: The employer must furnish, at no cost to the worker, all tools and supplies necessary to carry out the work, unless it is common practice in the area and occupation for the worker to provide certain items.<sup>17</sup>

- 2. The only protections afforded to H-2B workers under the Immigration Reform and Control Act of 1986 are that workers must be paid at least the "prevailing wage rate," and if they are discharged before the end of their visa the employer must pay for their transportation home.<sup>18</sup> The three-fourths guarantee does not apply, and employers are not required to provide housing, transportation (except

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<sup>12</sup> 20 C.F.R. § 655.102(b)(5).

<sup>13</sup> 20 C.F.R. § 655.102(b)(5)(i).

<sup>14</sup> *Arriaga v. Florida-Pacific Farms, LLC*, 305 F.3d 1228 (11<sup>th</sup> Cir. 2002). Deductions are discussed in more detail in response to question 21.

<sup>15</sup> 20 C.F.R. § 655.102(b)(4).

<sup>16</sup> 20 C.F.R. § 655.102(b)(2).

<sup>17</sup> 20 C.F.R. § 655.102(b)(3).

<sup>18</sup> 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6)(vi)(E); 20 C.F.R. §§ 655.0(a), 655.3. The "prevailing wage rate," which is the average wage paid to similarly employed workers in the same occupation and area of intended employment, is determined by the State Workforce Authority.

for transportation home if the worker is dismissed), or meals.<sup>19</sup> Likewise, IRCA does not require employers to provide workers' compensation to employees injured in the course of their employment, although state laws may require such coverage.

- B. The **Fair Labor Standards Act (FLSA)** establishes protections applicable to all workers, including H-2A and H-2B workers. Workers performing agricultural work (including some but not all H-2A workers), and domestic work, are exempted from some of these protections. The specific protections are discussed below in response to question 20.
- C. The **Migrant and Seasonal Agricultural Worker Protection Act (AWPA)**<sup>20</sup> establishes rights for H-2B workers employed in forestry and agricultural food processing, and possibly also for workers employed in seafood processing.<sup>21</sup> It does not apply to H-2A workers.<sup>22</sup>

Workers covered by AWPA have the following rights:

1. Employers are required to disclose in writing the terms and conditions of employment at the time of hire,<sup>23</sup> including an explanation of the pay rate;<sup>24</sup>
2. Employers are required to adhere to all promised conditions of employment;<sup>25</sup>
3. Any housing provided by employers must comport with applicable local health and safety codes (such as those requiring an adequate sanitation facility, potable water, weather-proofed sleeping quarters, ventilation and windows adequate to ensure both health and fire safety and locking doors to secure personal belongings), and may not be occupied until a state or local health authority has certified that the housing complies with those laws;<sup>26</sup>
4. Any transportation provided by employers must use vehicles that meet health and safety requirements, including being properly insured, being driven by a licensed driver and complying with occupancy limits;<sup>27</sup>
5. Retaliatory firing of employees who assert rights under the AWPA is prohibited.<sup>28</sup>

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<sup>19</sup> Employers must also reimburse transportation expenses if the costs of transportation paid by the worker to the worksite, when deducted from his first week's wages, would cause his hourly wages to fall below required minimum hourly wage levels. *See* text accompanying note 14.

<sup>20</sup> 29 U.S.C. § 1801 *et seq.*

<sup>21</sup> 29 U.S.C. § 1802(3).

<sup>22</sup> 29 U.S.C. § 1802(8)(B)(ii).

<sup>23</sup> 29 U.S.C. § 1821(a).

<sup>24</sup> Migrant workers must always be given the disclosure statement; workers who do not migrate to the work must request disclosure. 29 U.S.C. §§ 1821(a)(2), 1843.

<sup>25</sup> 29 U.S.C. § 1822(c).

<sup>26</sup> 29 U.S.C. § 1823.

<sup>27</sup> 29 U.S.C. § 1841; 29 C.F.R. §§ 500.100, 500.105.

<sup>28</sup> 29 U.S.C. § 1855(a); 29 U.S.C. § 215(a)(3).

- D. The **Occupational Safety and Health Act** requires an employer of any kind of worker, including H-2B workers, to “furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”<sup>29</sup> The employer must comply with all applicable federal occupational safety and health standards, including standards governing workplace safety and temporary labor camps.<sup>30</sup>
- E. An **Executive Order** requires federal agencies to provide services to individuals with limited proficiency in English.<sup>31</sup> Likewise, **Title VI of the Civil Rights Act of 1964** requires state agencies that receive any federal funding to provide services to individuals with limited proficiency in English. For example, state and federal Departments of Labor must make it possible for Spanish-speaking workers to file complaints about violations of their employment rights.
- F. H-2A workers are eligible for federally-funded legal services.<sup>32</sup> H-2B non-forestry workers are ineligible for such assistance. Until December 2007, all H-2B workers were ineligible for such services, but H-2B forestry workers are now eligible. See the responses to Questions 5 and 6 for more details about H-2B workers’ eligibility for such services.
- G. Federal laws provide protection against discrimination, as described in response to Questions 56, 57 and 60.

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<sup>29</sup> 29 U.S.C. § 654(a)(1).

<sup>30</sup> See, e.g., 29 C.F.R. § 1910.142 (governing temporary labor camps).

<sup>31</sup> Exec. Order 13166, 65 F.R. 50121 (Aug. 11, 2000).

<sup>32</sup> 45 C.F.R. § 1626.11.

## State law

States have a variety of laws establishing workers' rights, some of which are applicable to workers with H-2A and H-2B visas.

For a summary of state laws establishing state minimum wage and overtime pay standards, see the response to Question 20. State minimum wages may differ from the federal minimum wage, in which case the FLSA makes the higher standard applicable.

For a summary of state laws that prohibit wage deductions, see the response to Question 21.

For a summary of state laws against discrimination, see the response to Question 56.

Below are examples of other types of state laws that establish worker protections applicable to H-2A and/or H-2B workers.

### A. *Arkansas*

1. If an employer terminates the employee, the employer must tender any wages due within seven days of the discharge, provided the employee has requested or demanded payment. In all other cases, payment must be made at the regularly scheduled payday, absent some agreement between the employer and the employee to the contrary.<sup>33</sup>

### B. *Florida*

1. Workers have the right to information about the pesticides being used in the workplace.<sup>34</sup>
2. An employer must pay compensation or furnish benefits if the employee suffers an accidental compensable injury or death arising out of the work performed in the course and the scope of employment.<sup>35</sup> Any subcontractor to whom a contractor sublets any part of his contract is liable for the payment of workers' compensation.<sup>36</sup>

### C. *Idaho*

1. Upon layoff or termination by either the employer or the employee, all wages due must be paid to the employee before the next regularly scheduled payday or within 10 days of termination, weekends and holidays excluded. If the employee makes a written request for earlier payment of his wages, all wages owed must be paid within 48 hours, weekends and holidays excluded.<sup>37</sup>

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<sup>33</sup> ARK. CODE ANN. §§ 11-4-405 *et seq.*

<sup>34</sup> FLA. STAT. ANN. § 450.175 *et seq.*

<sup>35</sup> FLA. STAT. § 440.09

<sup>36</sup> FLA. STAT. § 440.110

<sup>37</sup> IDAHO CODE § 45-606.

D. Oregon

1. Holders of H-2A and H-2B visas have the following rights under Oregon law:
  - a. The activities of farm labor contractors, including contractors arranging for work in forestry, are regulated, and licensing with the Bureau of Labor and Industries is required, as are disclosure of terms of employment in writing in English and any other language in which the contractor communicates with workers, execution of a written contract, safe housing, insured transportation, and posting of a bond to guarantee payment of wages.<sup>38</sup> All H-2A workers, and H-2B workers in forestry and agricultural food processing are covered by these protections. Other H-2B workers are not covered.
  - b. Labor camps must be accessible to providers of any service (including legal services) that is provided with federal, state, or local funding.<sup>39</sup>
  - c. H-2A and H-2B workers must be given at least a 10-minute paid break for every 4 hours worked, and an unpaid break of 30 minutes for lunch after 6 hours of work.<sup>40</sup>
2. Holders of H-2A visas, but not holders of H-2B visas, have the following rights under Oregon law:
  - a. Licensing of farm labor camps and camp operators, safe conditions, and access to a telephone;<sup>41</sup>
  - b. If a worker is discharged, gave 48 hours advance notice of leaving, or employment ends by mutual agreement, on the last day of work the worker must be paid all wages that are due. Otherwise, wages must be paid in full within 48 hours after termination of employment.<sup>42</sup>
3. Holders of H-2B visas, but not holders of H-2A visas, have the following rights under Oregon law:
  - a. If a worker is discharged, gave 48 hours advance notice of leaving, or employment ends by mutual agreement, by the end of the first business day after termination the worker must be paid all wages that are due. Otherwise, wages must be paid in full within 5 business days after termination of employment.<sup>43</sup>

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<sup>38</sup> OR. REV. STAT. § 658.405 *et seq.*

<sup>39</sup> OR. REV. STAT. § 659A.250 *et seq.*

<sup>40</sup> OR. ADMIN. R. 839-20-050.

<sup>41</sup> OR. REV. STAT. § 658.705 *et seq.*

<sup>42</sup> OR. REV. STAT. § 652.145.

<sup>43</sup> OR. REV. STAT. § 652.140.

***1(b). What is the legal foundation for making a distinction between H-2A and H-2B workers?***

The Immigration Reform and Control Act of 1986 (IRCA) distinguishes between H-2A and H-2B workers. That statute defines an H-2A worker as an individual:

having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or service, as defined by the Secretary of Labor in regulations and including agricultural labor defined in Section 3121(g) of Title 26, agriculture as defined in Section 203(f) of Title 29, and the pressing of apples for cider on a farm, of a temporary or seasonal nature.<sup>44</sup>

It defines an H-2B worker as an individual:

having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other temporary services or labor if unemployed persons capable of performing such service or labor cannot be found in this country, but this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession.<sup>45</sup>

As described in response to question 1(a), IRCA, the Migrant and Seasonal Agricultural Worker Protection Act, and some state statutes provide certain protections only to H-2A workers or to H-2B workers.

***1(c). Who determines this difference?***

Each employer decides whether to apply to the U.S. DOL Employment and Training Administration (ETA) for certification as an H-2A or H-2B employer for a particular job. The U.S. DOL ETA is responsible for deciding whether to issue a temporary labor certification.

***1(d). How does the appropriate authority ensure that workers admitted with H-2B visas do not do the H-2A work?***

As described below in response to question 2(a), an employer who applies for certification as an H-2B employer is required to provide to the state employment services agency designated by the U.S. DOL a description of the duties its H-2B employees will perform. The state agency (known as a “State Workforce Agency”) is required to reject applications that do not comply with U.S. DOL policies.<sup>46</sup> However, there is no governmental body charged with ensuring that workers

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<sup>44</sup> 8 U.S.C. § 1101 (a)(15)(H)(ii)(a).

<sup>45</sup> 8 U.S.C. § 1101 (a)(15)(H)(ii)(b).

<sup>46</sup> U.S. Department of Labor, Employment & Training Advisory System, Foreign Labor Certification Training and Employment Guidance Letter No. 21-06, Change 1, sec. IV (June 25, 2007).

admitted with H-2B visas actually do the work described by the employer, or that they are not doing H-2A work.

**2(a). What procedure should be followed by employers who want to register their companies as needing workers under the H-2A and H-2B programs?**

H-2A program

Employers wishing to register their companies as needing workers under the H-2A program must first file for temporary labor certification with the U.S. Department of Labor Employment and Training Administration, no less than 45 days before the date of need indicated on Form ETA 790. A duplicate application must be filed at same time with the local state employment office serving the area of intended employment.<sup>47</sup>

The temporary labor certification application must state the number of workers needed and the length of the season, and must include: a) a job offer for recruitment of U.S. and H-2A workers (known as a “clearance order”) complying with the requirements of 20 C.F.R. §§ 655.102 and 653.501; b) an agreement to abide by the assurances required by 20 C.F.R. § 655.103; and c) an H-2A petition.<sup>48</sup> The work to be performed must be seasonal or temporary.<sup>49</sup>

The temporary labor certification is a finding by the Department of Labor that there are insufficient available and qualified U.S. workers at the time and place needed, and that the terms and conditions being offered will not adversely affect U.S. workers. This determination is made by attempting to recruit U.S. workers through the interstate job clearance system and by positive recruitment efforts that are supposed to be required of the employer.<sup>50</sup>

The certification decision must be made no later than 20 calendar days before the date the workers are needed.<sup>51</sup> The Department of Labor may deny the temporary labor certification application if: a) the certification requirements are not met;<sup>52</sup> b) there is a strike or lockout in the course of a labor dispute;<sup>53</sup> or c) the Department of Labor has found a substantial violation of a material term or condition of labor certification in the past two years.<sup>54</sup>

After the Secretary of Labor approves a labor certification, the H-2A application is filed with the Department of Homeland Security, which, in theory, makes the final determination, and could overrule the Department of Labor. In reality, the Department of Homeland Security’s consideration of the application is *pro forma*, once the Department of Labor has approved the labor certification.

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<sup>47</sup> 20 C.F.R. § 655.101.

<sup>48</sup> 20 C.F.R. § 655.101(b).

<sup>49</sup> 20 C.F.R. § 655.100(c)(2)(ii).

<sup>50</sup> 20 C.F.R. §§ 655.103(d)(1), 655.105(a).

<sup>51</sup> 8 U.S.C. § 1188(c)(3); 20 C.F.R. § 655.101(c).

<sup>52</sup> 8 U.S.C. § 1188(c)(3)(A)(i); 20 C.F.R. § 655.104(b).

<sup>53</sup> 20 C.F.R. § 655.103(a).

<sup>54</sup> 20 C.F.R. § 655.110(a).

## H-2B program

Employers wishing to register their companies as needing workers under the H2-B program must first submit an application to the state employment services agency designated by the U.S. DOL (known as a “State Workforce Agency” or “SWA”). The application must explain why the job is a temporary one. It must be accompanied by a form on which the employer specifies the job duties, hours of employment per week, daily work schedule, rate of pay, where the work will be performed, and how long the job will last. The form also requires the employer to affirm that “the job opportunity’s terms, conditions and occupational environment are not contrary to Federal, State or local law.”<sup>55</sup>

The State Workforce Agency reviews the application for completeness, establishes the prevailing wage for that particular job, and ensures that the employer promises to pay at least that wage.<sup>56</sup> The SWA then posts the job for 10 days, and the employer advertises the job in a newspaper. The ability of the SWA’s to scrutinize employers’ applications is hampered by underfunding and staffing shortages. In 1996, as a result of federal budget cuts, the staffing levels for SWA’s were nearly cut in half.<sup>57</sup>

If the SWA approves an application, the SWA sends it to a U.S. DOL office known as a “National Processing Center,” which decides whether to grant or deny labor certification to the employer.<sup>58</sup> The National Processing Center decision is based on whether it believes the job is truly temporary, whether U.S. workers cannot be found to perform the job, and whether granting the certification will depress the wages of U.S. workers.<sup>59</sup> To petitioners’ knowledge, the National Processing Center decision is not based on whether the employer is likely to protect or violate the rights of its H-2B workers, other than the right to receive the prevailing wage. The ability of the National Processing Centers to conduct any meaningful review of employers’ applications is also limited by the fact that the Centers are overburdened and understaffed: in 2005, seven of the nine offices processing H-2B applications were closed.<sup>60</sup> Moreover, the

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<sup>55</sup> U.S. Department of Labor, Employment & Training Advisory System, Foreign Labor Certification Training and Employment Guidance Letter No. 21-06, Change 1, Attachment sec. III.A (June 25, 2007) (requiring H-2B employers to fill out Part A of Form 750); U.S. Department of Labor, ETA Form 750, Part A, Offer of Employment, available at <http://www.foreignlaborcert.doleta.gov/pdf/eta750a.pdf>.

<sup>56</sup> Additional scrutiny is applied to applications for H-2B certification in tree planting and related reforestation occupations, as described below in response to question 22.

<sup>57</sup> See Andrew J. Elmore, *Egalitarianism and Exclusion: U.S. Guest Worker Programs and a Non-Subordination Approach to the Labor-Based Admission of Nonprofessional Foreign Nationals*, 21 Georgetown Immig. L. J. 521, 539 (2007).

<sup>58</sup> U.S. Department of Labor, Employment & Training Advisory System, Foreign Labor Certification Training and Employment Guidance Letter No. 21-06, Change 1, Attachment sec. IV.I (June 25, 2007).

<sup>59</sup> U.S. Department of Labor, Employment & Training Advisory System, Foreign Labor Certification Training and Employment Guidance Letter No. 21-06, Change 1, Attachment sec. V.A (June 25, 2007). See also 8 C.F.R. § 214.2(h)(6)(iv)(A).

<sup>60</sup> See Andrew J. Elmore, *Egalitarianism and Exclusion: U.S. Guest Worker Programs and a Non-Subordination Approach to the Labor-Based Admission of Nonprofessional Foreign Nationals*, 21 Georgetown Immig. L. J. 521, 539 (2007).

DOL's own Inspector General has reported that one of the National Processing Centers ignored reports of possible fraud and other problems sent to it by the local SWA.<sup>61</sup>

If the National Processing Center decides to grant certification, it notifies the employer, which must submit the application to U.S. Department of Homeland Security Citizenship and Immigration Services ("USCIS").<sup>62</sup> As is the case with H-2A applications, USCIS's review of the application at this point is cursory.

***2(b). Did the Universal Forestry company in Idaho and the Mountain Fresh company in Colorado meet the requirements when registering as a company needing H-2A and H-2B workers?***

Petitioners do not know. However, Mountain Fresh apparently applied for H-2B certifications for jobs in which the workers were put to work in the fields, so the certifications should have been applied for under the more rigorous H-2A regulations.

***2(c). How closely does the federal and/or local labor authority review these companies?***

The federal and state labor authorities do not conduct a careful review of companies' compliance with the laws regarding the employment rights of H-2B workers. The process that employers must follow to register for certification as an H-2B employer, which is described above in response to question 2(a), relies largely on self-reporting by employers. The responsible agencies, which are hampered by funding and staff shortages, make little or no effort to confirm the truth of the employers' statements. Indeed, as discussed in response to question 2(a), one of DOL's National Processing Centers ignored reports of possible fraud and other problems sent to it by the local State Workforce Agency.

Once an employer has been certified as an H-2B employer, there is no federal agency that investigates whether the employer is in fact complying with the terms of the H-2B program, including the right to receive the prevailing wage, or respond to complaints regarding an employer's lack of compliance. The U.S. Department of Labor does not do so.<sup>63</sup> Nor does the Department of Homeland Security. This is evident from the agencies' responses to requests petitioners filed in March and April 2008 for records of complaints filed, investigations conducted, or penalties imposed from January 2003 to date regarding employers' noncompliance with the terms of the H-2B program: the Department of Labor referred petitioners to the Department of Homeland Security, and the Department of Homeland Security referred petitioners to the Department of Labor. In contrast to the U.S. DOL's failure to enforce the

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<sup>61</sup> U.S. Department of Labor, Office of the Inspector General, Semiannual Report to Congress (Oct. 1, 2004-Mar. 31, 2005), at 21-22, available at <http://www.oig.dol.gov/public/semiannuals/53.pdf>.

<sup>62</sup> U.S. Department of Labor, Employment & Training Advisory System, Foreign Labor Certification Training and Employment Guidance Letter No. 21-06, Change 1, sec. VI (June 25, 2007).

<sup>63</sup> U.S. Department of Labor, Employment Standards Administration, Wage & Hour Division, Field Assistance Bulletin No. 2007-1: Enforcement Provisions Applicable to H-2B Workers (May 2, 2007) (stating that DOL will take the prevailing wage into account for purposes of calculating overtime and compliance with the Migrant and Seasonal Agricultural Worker Protection Act, but not for purposes of considering whether an employer is complying with its obligations under the H-2B program).

terms of the H-2B program, the agency does make some effort to enforce the terms of the H-2A program.<sup>64</sup>

The U.S. Department of Labor does recognize that it has jurisdiction over employers' compliance with the rights of H-2B workers under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act described above in response to question 1(a).<sup>65</sup> However, because of severe staffing and budgetary constraints the U.S. DOL and state departments of labor conduct very few investigations into employers' compliance with these statutes.<sup>66</sup> This problem has grown steadily worse over the past three decades. During that time, "the number of workplace investigators declined by 14% and the number of compliance actions completed declined by 36% – while the number of covered workers grew by 55%, and the number of covered establishments grew by 112%."<sup>67</sup> Moreover, although the U.S. DOL generally requires employers who have violated these laws to pay any wages owed, it rarely imposes penalties on employers who violate these laws.<sup>68</sup> As a result, there is very little incentive for employers to follow the law.

For the same reasons, these agencies are often reluctant to follow up on complaints by H-2B workers regarding violations of these statutes. The facts in the case of petitioner Candelario Perez and five other H-2B workers employed by Universal Forestry in Idaho, and described in the petition, are illustrative. The workers were unable to attract the attention of the U.S. DOL, despite the submission by the Idaho DOL of an "apparent violation" complaint regarding alleged labor law violations by Universal Forestry. In response to the submission, the U.S. DOL claimed, erroneously, that: 1) the Migrant and Seasonal Agricultural Worker Protection Act

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<sup>64</sup> Statement of Leon R. Sequeira, Assistant Secretary for Policy and William L. Carlson, Ph.D., Administrator, Office of Foreign Labor Certification, U.S. Department of Labor, Before the House Committee on Education and Labor, May 6, 2008 ("The Department's Wage and Hour Division of the Employment Standards Administration enforces the terms and conditions of employment in the H-2A program, but Congress has vested the Department of Homeland Security with enforcement responsibility for the H-2B program."). *See also* 29 C.F.R. § 501.

<sup>65</sup> U.S. Department of Labor, Employment Standards Administration, Wage & Hour Division, Field Assistance Bulletin No. 2007-1: Enforcement Provisions Applicable to H-2B Workers (May 2, 2007).

<sup>66</sup> In 1982, it was already clear that "[a]s budget cuts undermine the Federal Government's ability to enforce the law, farm workers will depend increasingly on the private bar and legal services organizations to insure that violators are punished and that they are made whole for their losses and suffering." 128 Cong. Rec. H10456 (daily ed. Dec. 20, 1982) (statement of Rep. Ford). *See* Human Rights Watch, *Fingers to the Bone: United States Failure to Protect Child Farmworkers*, text accompanying nn. 190-92, 195-96 (2000), available at <http://www.hrw.org/reports/2000/frmwkr/>.

<sup>67</sup> Annette Bernhardt et al., *Unregulated Work in the Global Workplace: Employment and Labor Law Violations in New York City* (2007), p. 31, available at [http://brennan.3cdn.net/391088fe3ab3461f66\\_ygm6bk15t.pdf](http://brennan.3cdn.net/391088fe3ab3461f66_ygm6bk15t.pdf). *See also* U.S. Government Accountability Office, *Fair Labor Standards Act: Better Use of Available Resources and Consistent Reporting Could Improve Compliance* (July 15, 2008), p. 2, available at <http://edlabor.house.gov/testimony/2008-07-15-Anne-MarieLasowski.pdf> (reporting that from 1997 to 2007, federal investigations into wage and hour violations fell by more than 30 percent).

<sup>68</sup> *See* U.S. Government Accountability Office, *Fair Labor Standards Act: Better Use of Available Resources and Consistent Reporting Could Improve Compliance* (July 15, 2008), pp. 11, 17, available at <http://edlabor.house.gov/testimony/2008-07-15-Anne-MarieLasowski.pdf> (reporting that in the last ten years, the U.S. DOL imposed penalties on only 6% of employers who violated the Fair Labor Standards Act).

does not apply to H-2B workers, and 2) U.S. DOL could not pursue the complaints due to the fact that they were in Spanish<sup>69</sup> and because the employer was not the Idaho at the time.<sup>70</sup>

**2(d). What procedure is employed if the employers do not follow the requirements that companies who employ H-2A and H-2B workers should follow?**

See response to question 2(c).

**3(a). What penalties do these companies face if they do not meet the requirements? According to the law, which government authority should impose these penalties?**

If an employer is found to have committed either: 1) a substantial failure to meet any of the conditions of an H-2B petition, or 2) a willful misrepresentation of a material fact in such petition, the U.S. Department of Homeland Security (DHS) may:

- A. Impose administrative remedies (including civil monetary penalties of up to \$10,000 for each violation).<sup>71</sup> Petitioners are not aware of DHS ever imposing such fines.
- B. Deny petitions filed with respect to these employers for a period of one to five years.<sup>72</sup> Petitioners are not aware of DHS ever denying a petition for this reason.
- C. Delegate to the Secretary of Labor the authority to impose sanctions.<sup>73</sup> According to the Department of Labor, DHS has not delegated this authority.<sup>74</sup> Migrant advocates have been unsuccessful in their attempts to petition the U.S. Department of Labor not to recertify employers whose negligence caused the death of other H-2B workers.<sup>75</sup> Petitioners are aware of the following instances in which the Department of Labor continued to recertify employers after finding violations of the H-2B program:
  1. Even after twice fining a particular employer for failing to pay the minimum wage and overtime to its workers, the Department of Labor continued to provide H-2B certification to the employer.<sup>76</sup>
  2. The Department of Labor continued to provide H-2B certification to a forestry contractor even after the Department's own Wage and Hour Division found that the contractor had "a woeful history of labor violations," and after a group of H-2B workers sued the contractor for

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<sup>69</sup> As discussed above in response to question 1(a), federal Executive Order 13166 in fact requires the U.S. DOL and other agencies to help workers with limited proficiency in English.

<sup>70</sup> These facts are described in the Memorandum in Support of Petition submitted by the Petitioners on April 13, 2005, at section I.A.2.a.

<sup>71</sup> 8 U.S.C. § 1184(c)(14)(A)(i).

<sup>72</sup> 8 U.S.C. § 1184(c)(14)(A)(ii).

<sup>73</sup> 8 U.S.C. § 1184(c)(14)(B).

<sup>74</sup> U.S. Department of Labor, Employment Standards Administration, Wage & Hour Division, Field Assistance Bulletin No. 2007-1: Enforcement Provisions Applicable to H-2B Workers (May 2, 2007).

<sup>75</sup> See, e.g., Tom Knudson, *Firm fined in van crash is OK'd to hire pineros*, THE SACRAMENTO BEE, Mar. 9, 2006, available at <http://dwb.sacbee.com/content/news/projects/pineros/updates/story/14227972p-15051516c.html>

<sup>76</sup> Mary Bauer, *Close to Slavery: Guestworker Programs in the United States*, Southern Poverty Law Center (2007), p. 20.

holding them in involuntary servitude and housing them in a storage shed.<sup>77</sup>

3. The Department of Labor continued to provide H-2B certification to an employer even after discovering that an employer had applied for H-2B certification for jobs for which he should have applied for H-2A certification, and consequently was fraudulently receiving the benefit of the weaker worker protections in the H-2B program.<sup>78</sup>

**3(b). From 2003 to present, have these penalties been imposed on Universal Forestry in Idaho or Mountain Fresh in Colorado, or any of the other companies in the states of Idaho, Colorado, Arkansas, Texas, Florida, Oregon, Tennessee, and Wyoming that employed H-2A and H-2B workers?**

Petitioners do not know.

**3(c). If so, what did these penalties entail and how did the proper authority ensure that they were followed?**

See response to question 3(b).

**4. Under article 21.2 (b) of the NAALC (North American Agreement on Labor Cooperation), please provide information regarding any proposed changes to the procedures, policies, or practices related to the labor rights of H-2A and H-2B workers.**

- A. The **Increasing American Wages and Benefits Act, S. 2094**, introduced in September 2007, would reform the H-2B program by applying to H-2B workers many of the protections currently available to H-2A workers, such as transportation reimbursement, the 75% work guarantee and the provision of workers' compensation. The bill would also increase the prevailing wage rates and authorize lawyers funded by the Legal Services Corporation to represent all H-2B workers.
- B. The **Indentured Servitude Abolition Act of 2007, H.R. 1763**, would require employers and labor recruiters to disclose to all workers recruited abroad the terms of their employment. The disclosures would be required to be made in writing and at the time of recruitment. The legislation would bar employers from violating the terms of the working arrangement. It would bar employers and recruiters from charging workers fees for recruitment and would require employers to pay the cost of transportation from the worker's home to the place of employment and back again at the end of the job. The bill would make employers liable for violations committed by their recruiters.

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<sup>77</sup> Mary Bauer, *Close to Slavery: Guestworker Programs in the United States*, Southern Poverty Law Center (2007), p. 29.

<sup>78</sup> Javier Riojas, Testimony Before the U.S. House Committee on Education and Labor (May 6, 2008), available at <http://edlabor.house.gov/testimony/2008-05-06-JavierRiojas.pdf>

C. Several pending bills, including **The Save Our Small and Seasonal Businesses Act of 2007, H.R. 1843 and S.988; The Relief for America’s Small and Seasonal Businesses Act, H.R. 5495; and Giving Relief to Our Small Businesses Act, H.R. 5233**, would exempt returning H-2B workers from the annual numerical cap placed on H-2B visas.

D. **The Agricultural Job Opportunities, Benefits, and Security Act of 2007 (“AgJOBS”), S.340 and H.R. 371**, would modify the existing H-2A program in the following ways:

The H-2A program’s application process would be streamlined to reduce paperwork for employers and limit the government’s oversight of the employer’s application. The process also would be sped up. It would require the Secretary of Labor to issue a “certification” to the employer within 7 days of receiving an application after reviewing the application only for completeness and obvious inaccuracies.

Most important H-2A worker protections would continue, although some that were in the Department of Labor’s H-2A regulations would now appear in the statute itself. However, the bills would modify some current H-2A requirements in important ways. Currently, an H-2A employer must provide housing at no cost (to non-local workers). Under AgJOBS, an employer could provide a monetary housing allowance (set by a formula based on subsidized housing rents) instead of housing, but only where the governor of a state has certified that there is sufficient farm worker housing available in the local area. The H-2A employer, by statute (and not just regulation), would be required to pay at least the highest of the state or federal minimum wage rate, the local “prevailing wage” for the particular job, or an Adverse Effect Wage Rate (AEWR). This bill would revise the method of calculating the AEWR.

For the first time, H-2A workers would have the right to go to federal court to enforce their rights under the H-2A program. Currently, H-2A workers lack such a right and are forced into local state courts under state contract law. The bill specifies that H-2A workers would be permitted to file a federal lawsuit to enforce their wages, housing benefits, transportation cost reimbursements, minimum-work guarantee, motor vehicle safety protections, and other terms in the written H-2A job offer.

The Secretary of Labor would be required to establish an administrative complaint mechanism with specified time frames to resolve farmworkers’ complaints of H-2A employers’ violations of their rights, and would have authority to impose back pay and civil money penalties, and to bar employers from the program if they violate the law.

E. **H. RES. 440** would express the sense of the House of Representatives that any comprehensive plan to combat illegal immigration must increase resources for border patrol, establish an instant employment eligibility verification system, renew a limited temporary worker program, prohibit blanket amnesty for illegal aliens who have deliberately broken the law, and give priority to law-abiding, highly-skilled immigrants applying for legal citizenship.

- F. **H.R. 1792** would simplify the process for admitting H-2A temporary alien agricultural workers under section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act.
- G. **H.R. 2954** would strengthen enforcement of immigration laws, and increase operational control over the borders of the United States. It includes a provision on employer and recruitment requirements, and would revise the temporary agricultural worker program.
- H. The U.S. DOL has proposed regulatory changes in the H-2B program.<sup>79</sup> However, those changes are not currently in effect, and they may not be for a while. When the DOL issued the proposed regulation, it invited the public to submit comments. Before the comment period closed in early July 2008, the DOL received at least 80 comments from members of Congress, workers' rights advocates, industry groups, and other members of the public. Before implementing the regulation, the DOL must now review all of the comments and consider whether to amend the regulation in light of the comments. The last time the DOL proposed changes to its H-2B regulations, in 2005, it received so many comments that it never implemented a final regulation.

The DOL's proposed changes would severely weaken the government's oversight over the H-2B visa process. Employers seeking certification as H-2B employers would be allowed to merely attest that they have complied with all legal requirements, instead of submitting evidence that they have done so. The state workforce agencies currently charged with scrutinizing employers' applications would no longer do so.

The DOL proposes to offset this weakened oversight by conducting investigations into whether employers are in fact complying with the terms of the H-2B program, and by imposing more severe penalties on noncompliant employers. However, it is doubtful that the DOL will be able to do either. As discussed above, because of severe staffing and budgetary constraints the DOL conducts very few investigations into employers' compliance with the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act. The same resource constraints will also hamper its ability to investigate violations of the H-2B program. Moreover, the proposed regulation acknowledges the DOL will not impose new penalties on noncompliant employers unless the separate U.S. Department of Homeland Security delegates to the DOL the power to impose those penalties. So far, the Department of Homeland Security has not done so.

- I. Both the U.S. Department of Homeland Security and U.S. Department of Labor have proposed regulatory changes in the H-2A program. 73 Fed. Reg. 8230 (Feb. 13, 2008); 73 Fed. Reg. 8538 (Feb. 13, 2008). Among the changes proposed are:
  - 1) weakening the requirement that employers recruit U.S. workers before seeking H-2A certification,

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<sup>79</sup> 73 Fed. Reg. 29942 (May 22, 2008).

2) replacing the requirement that the U.S. Department of Labor scrutinize the hiring process and the details of the job offer with a requirement that employers merely sign a form attesting that they will comply with any obligations, and

3) replacing employers' current obligation to provide housing with a requirement that they merely offer vouchers that workers could use to try to find their own housing.

## **Article 4 of the NAALC, access to proceedings**

### ***5(a). What is the juridical nature of LSC?***

The Legal Services Corporation (LSC) is a government-chartered non-profit corporation created in 1974 by the Legal Services Corporation Act.<sup>80</sup> A bipartisan, 11-member Board of Directors (appointed by the President of the United States with the advice and consent of the Senate) oversees all aspects of LSC operations.<sup>81</sup>

### ***5(b). Is it federally or locally based?***

The LSC is federally funded and federally administered.

### ***5(c). How is it financed?***

Each year, as part of the budget process, Congress allocates funding to the LSC.

### ***5(d). How does the LSC operate?***

The LSC is the main source of funding for civil legal aid. It awards grants through a competitive process to independent, non-profit programs. In 2007, it provided funding to 138 programs with more than 900 offices nationwide, making legal assistance available to financially eligible persons in every county of every state. The local programs, generally called “legal services” or “legal aid” programs, in turn provide low-income people in their communities with legal assistance in civil legal matters, subject to regulatory and statutory restrictions with regard to what services may be provided and to whom. Grants are awarded through a competitive process. Generally, the size of the grant is based on the number of people living in poverty in a given state or service area.

## ***6. In conformity with article 4.2 (a) of the NAALC, in what way do the U.S., and the local governments of Idaho, Colorado, Arkansas, Texas, Florida, Oregon, Tennessee, and Wyoming guarantee that H-2B workers have access to proceedings to enforce their rights in the United States?***

Workers in the United States can enforce their rights in two ways: by going to court to enforce their rights, or by asking a government agency to investigate and commence a proceeding.

### **Going to court**

As described in the memorandum of law filed with the initial petition in this proceeding, a lawyer is usually needed to file an action in court.

Although the federal government provides funding to the LSC to enable low-income workers who are citizens to obtain an attorney to enforce their rights, it does not provide such funding for

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<sup>80</sup> 42 U.S.C. § 2996b.

<sup>81</sup> 42 U.S.C. § 2996c.

H-2B workers in industries other than forestry.<sup>82</sup> In fact, it bars local civil legal aid programs that receive any LSC funding from using other sources of funding to represent such workers.<sup>83</sup>

This means that, unless a program exists that provides free or low cost services to immigrant workers, but does not receive federal funding, it is unlikely that H-2B workers will be able to access the courts. In a few states, small programs exist that are able to undertake a limited amount of this representation. Florida, Oregon and Texas, for example, have small, independently funded programs that have some ability to accept such cases, although there is limited funding to do so, which precludes their ability to take many cases. However, Idaho, Colorado, Arkansas, and Wyoming lack unrestricted legal services programs able to assist H-2B workers.<sup>84</sup>

### Seeking an agency response

Without a lawyer, a worker suffering a violation of the worker protection laws that apply to all U.S. workers (such as the Fair Labor Standards Act) can file a complaint with the local offices of the U.S. DOL or the state DOL.<sup>85</sup> However, as discussed in response to question 2(c), the federal and state DOLs are generally slow to follow up on such complaints because they suffer from insufficient funding.

An agency response is completely unavailable for the enforcement of the following rights:

- A. The only way for workers to obtain compensation for the violation of their rights under the AWPA is by going to court.<sup>86</sup> The only response the U.S. DOL can make to an AWPA violation is assessing fines – it cannot award the workers compensation.<sup>87</sup> In fact, when Congress created a private right of action under the AWPA, it recognized that administrative mechanisms were inadequate to protect workers, and that providing workers with access to the courts was the only way to protect them.<sup>88</sup>

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<sup>82</sup> 45 C.F.R. § 1626.3. Prior to 2008 (including during the time this petition arose) H-2B forestry workers were also ineligible for services. In December 2007, Congress for the first time authorized representation of forestry H-2B workers. Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844 (2007).

<sup>83</sup> 45 C.F.R. § 1610.8.

<sup>84</sup> See Petitioners' Memorandum in Support of Petition (April 13, 2005), section III.C.

<sup>85</sup> The Wage and Hour Division ("WHD") is responsible for administering and enforcing some of our nation's most comprehensive labor laws, including: the minimum wage, overtime, and child labor provisions of the FLSA; the Family and Medical Leave Act (FMLA); the AWPA; worker protections provided in several temporary visa programs; and the prevailing wage requirements of the Davis-Bacon Act and the Service Contract Act.

<sup>86</sup> 29 U.S.C. § 1854; see *The Role of the Forest Serv. and Other Fed. Agencies in Protecting the Health and Welfare of Foreign Guest Workers Carrying Out Tree Planting and Other Serv. Contracts on Nat'l Forest Sys. Lands: Hearing Before the Subcomm. on Public Lands and Forests of the S. Comm. on Energy and Nat'l Res.*, 109th Cong. 12 (2006) (hereinafter *Forest Service Hearing*) (statement of Victoria A. Lipnic, Assistant Sec'y of Labor Employment Standards Admin., U.S. Dept. of Labor) (noting critical role of private right of action under the FLSA).

<sup>87</sup> 29 U.S.C. § 1853.

<sup>88</sup> 128 Cong. Rec. H10456 (daily ed. Dec. 20, 1982) (statement of Rep. Ford) (emphasis added). Congress had amended the Farm Labor Contractor Registration Act, the AWPA's predecessor statute, to create a private right of action precisely because the administrative enforcement mechanisms had proved ineffective in enforcing workers' rights. See S. Rep. No. 1206, 93d Cong., 2d Sess. 3 (1974) ("It has become clear that the provisions of the Act cannot be effectively enforced. Noncompliance by those whose activities the Act was intended to regulate has become the rule rather than the exception. . . It is quite evident that the Act in its present form [with solely

- B. As discussed in response to question 2(c), the U.S. DOL does not investigate or respond to complaints regarding violations of the terms of the H-2B program or of the employment contracts entered into by H-2B workers.
- C. As discussed in response to question 15, the U.S. DOL has declined to proceed against employers who illegally confiscate the passports and visas of temporary workers.
- D. As discussed in response to question 21, the U.S. DOL has declined to enforce a federal court of appeals ruling holding that the Fair Labor Standards Act requires employers to reimburse temporary workers' transportation and visa costs if those costs bring the workers' wages below the legally required minimum wage.

**7(a). Under article 3.2 of the NAALC, what is the federal or state legislation that prohibits LSC-funded organizations from assisting H-2B workers?**

Since 1996, federal law has barred civil legal aid organizations that receive any funds from the LSC from providing legal assistance “for or on behalf of any alien unless the alien is present in the United States and is [among the categories specified as eligible for assistance].”<sup>89</sup> At the end of December 2007, this provision was amended to allow such organizations to represent H-2B workers admitted for employment in forestry in matters arising under their employment contract.<sup>90</sup> However, the organizations remain unable to help all other H-2B workers, many of whom suffer similar abuse regarding wages and working conditions.

**7(b). Through what other means can H-2B workers obtain free legal assistance from the U.S., if they cannot obtain it from LSC?**

There is no other means for H-2B workers to obtain free legal assistance from the federal government with respect to the terms and conditions of their employment. As noted in response to Question 6, workers may be able to obtain legal assistance from other sources in some states, although such assistance is not available in many states.

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administrative enforcement] provides no real deterrent to violations.”). *See also* H.R. Rep. No. 1493, 93d Cong., 2d Sess. 1 (1974); *Forest Service Hearing* 4-6 (statement of Mark Rey, Under Sec’y for Nat. Res. and Env’t, U.S. Dept. of Agric.) (responding to wide-spread abuse of H-2B workers contracted for by the U.S. Forest Service by directly incorporating federal worker protection laws, including provisions of the FLSA and the AWPA, into all Forest Service contracts); *see id.* at 21 (statement of Victoria A. Lipnic) (observing that the U.S. DOL typically does not inform the U.S. Forest Service when it becomes aware of a contracting agency’s repeated violations of federal worker protection laws).

<sup>89</sup> Consolidated Appropriations Act, 2005, Pub. L. 108-447, 118 Stat. 2809 (2004) (“None of the funds appropriated in this Act to the Legal Services Corporation shall be expended for any purpose prohibited or limited by, or contrary to any of the provisions of, sections 501, 502, 503, 504, 505, and 506 of Public Law 105-119 . . .”); 45 C.F.R. § 1626.

<sup>90</sup> Consolidated Appropriations Act, Pub. L. No. 110-161, 121 Stat. 1844 (2007).

**7(c). How does the labor authority ensure the enforcement of labor rights if H-2B workers are unable to obtain legal assistance?**

See response to Question 6.

**8. What are the differences in access to labor tribunals between workers who are citizens and H-2B workers? If it exists, why is there a difference?**

In theory, there is no difference. However, in practice, a non-U.S. worker of modest resources will have great difficulty accessing a labor tribunal, in the absence of legal representation, for several reasons.

- A. As discussed in response to question 13(a), the ability of an H-2B worker to work and live in the U.S. is tied to that particular employer. If the employee complains and as a result is fired, he must return to his own country. Because of this, many H-2B workers are afraid to complain about illegal working conditions during their employment. By contrast, U.S. citizens are free to live wherever they want and to work for any employer.
- B. H-2B workers are required to leave the country at the end of their employment. Some violations are not even apparent until departure. A failure to pay repatriation costs for workers who have been discharged before the end of their visa is one example. In any event, few violations will be resolved before the worker has to leave. Pursuing a claim from abroad is difficult. Citizens, however, can remain in the U.S. to pursue their claims after the end of their employment.
- C. As described in the initial petition and supporting memorandum of law, H-2B workers find that their inability to speak English is a barrier, as are cost and lack of familiarity with the laws and legal procedures of the United States. These problems can be overcome with the assistance of counsel, but they are nearly insurmountable without a lawyer's help.

## Article 5 of the NAALC, procedural guarantees

**9. What procedure is employed by U.S. DOL and the DOL in Idaho, Colorado, Arkansas, Texas, Florida, Oregon, Tennessee, and Wyoming to investigate complaints by H-2B workers about federal or state labor violations?**

### U.S. DOL

See response to Questions 2(a) and 2(c).

### State DOLs

A state may have two mechanisms that could possibly come into play. The state job services agency must have a complaint system that can take in complaints and refer them to other agencies. Generally, they do not have enforcement powers adequate to secure a remedy. (The most extreme measure most can take is to bar the employer from using the job service.)

Many states also have a wage collection agency that theoretically could help workers. However, many do not have bilingual staffing, and as discussed above in response to questions 2(a) and 2(c), all are under severe budget constraints and sometimes political constraints. In petitioners' cases, the state agencies failed to provide a remedy.

**10. From 2003 to the present, how many complaints by H-2B workers about state and federal labor violations have the aforementioned authorities seen? How long did it take these authorities to address the complaints? If penalties were imposed, who was penalized and what did it entail? How are these penalties enforced?**

Unknown.

**11. What are the differences between the procedural guarantees that workers who are citizens enjoy in comparison to H-2B workers? If it exists, why is there a difference?**

Workers who are citizens have access to legal counsel to assist in processing an agency claim or to bring a case in court. As discussed above in response to Question 6, H-2B workers who are not working in forestry generally do not have access to such assistance. Additionally, as discussed above in response to Question 8, H-2B workers must leave the country at the end of their employment, while citizens may stay in the country to pursue their claims.

## **Labor principle 4, prohibition against forced labor**

***12(a). What state and/or federal legislation prohibits an employer from withholding H-2B workers' immigration documents and from charging to get them back?***

The retention of immigration documents, if done to require continued performance of work, is a potential violation of federal law prohibiting involuntary servitude. See response to Question 14 below for a description of the laws prohibiting involuntary servitude.

***12(b). How can H-2B workers get their immigration documents returned?***

H-2B workers must go to court to repossess their immigration documents. In theory, they can file a complaint with any of the following: 1) the Federal Bureau of Investigation, which has authority over civil rights violations, or 2) the U.S. DOL or U.S. Immigration and Customs Enforcement, both of which have authority over the administration of the H-2B program. However, these agencies typically are not accessible to a worker in a rural area who does not have access to legal counsel.

***12(c). Who can H-2B workers file a complaint with if someone withholds their documents?***

See response to Question 12(b).

***13(a). Are workers with H-2B visas prohibited from searching for a job with an employer other than the one who hired them?***

H-2B workers are prohibited from obtaining legal employment with an employer other than the one who hired them, unless the new employer receives approval from U.S. Citizenship and Immigration Services.<sup>91</sup> The H-2B visa is only valid for as long as the petitioning employer employs the worker, and then for ten additional days to give the worker time to get home.<sup>92</sup> An H-2B worker who is hired by an employer other than the one who petitioned for his visa is considered to be out of status, and therefore illegally in the country.

***13(b). If the employer who hired them does not do what he promised, what alternatives does an H-2B worker have? With which DOL, federal or state, can these workers file a complaint?***

When an employer does not comply with its obligations, the worker has the following options:

- A. The worker can file a lawsuit for breach of contract, as discussed in response to Question 42.
- B. If the work is in forestry, food processing, and possibly seafood processing, the worker can file a lawsuit under the AWPA.
- C. The worker can file a complaint with the U.S. DOL's Wage and Hour Administration. However, as discussed in response to Question 2(c), that agency does not believe that

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<sup>91</sup> 8 C.F.R. § 214.2(h)(2)(i)(D).

<sup>92</sup> 8 C.F.R. § 214.2(h)(13)(i).

it has any authority to enforce the contractual promises of the employer, and will only afford a remedy if the employer has also violated the minimum wage and overtime provisions of the FLSA.

- D. The worker can complain to the federal OSHA regarding unsafe conditions. That agency can inspect and fine the employer, but cannot afford a remedy to the worker.
- E. In some states, state wage collection agencies exist that could theoretically be of assistance in collecting unpaid wages. This varies from state to state.

***14(a). Is withholding immigration documents, thereby prohibiting H-2B workers from searching for a new job and forcing them to stay with the employer, considered forced labor or involuntary servitude in U.S.?***

The retention of immigration documents, if done to compel performance of work, is a potential violation of federal law prohibiting involuntary servitude. The U.S. Supreme Court has recognized that “threatening ... an immigrant with deportation could constitute the threat of legal coercion that induces involuntary servitude.”<sup>93</sup>

***14(b). What state and/or federal legislation addresses the prohibition against involuntary servitude and forced work?***

The 13<sup>th</sup> Amendment to the U.S. Constitution prohibits involuntary servitude. This amendment has been codified into various sections of criminal statutes, including: 18 U.S.C. section 241 (conspiracy to deny rights), section 1581 (banning peonage), section 1583 (banning slavery), section 1584 (banning holding someone in involuntary servitude), and section 1589 (banning forced labor).

Civil actions for violations of the prohibition on involuntary servitude can be brought for damages for violations of section 1589 (described above) and section 1590, which prohibits trafficking for the purpose of involuntary servitude.<sup>94</sup>

The retention of immigration documents, if done to compel performance of work, is a potential violation of federal law prohibiting involuntary servitude. The Supreme Court of the United States has held that involuntary servitude “necessarily means a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process. ...[T]he vulnerabilities of the victim are relevant in determining whether the physical or legal coercion or threats thereof could plausibly have compelled the victim to serve.”<sup>95</sup> See discussion in response to Question 14(a)

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<sup>93</sup> *United States v. Kozminski*, 487 U.S. 931, 948 (1988).

<sup>94</sup> Civil actions can be brought under 18 U.S.C. § 1595, which reads pertinent in part: “An individual who is a victim of a violation of Section 1589, 1590, or 1591 of this chapter may bring a civil action against the perpetrator in an appropriate district court of the United States and may recover damages and reasonable attorneys’ fees.”

<sup>95</sup> *U.S. v. Kozminski*, 487 U.S. 931, 952 (1988)

In violation of these protections, many employers do confiscate their H-2B workers' legal documents. The Southern Poverty Law Center, which provides representation to H-2B workers and other immigrants, reports that it "has received dozens of reports of this practice and has, in the course of its legal representation of workers, confirmed that it is routine."<sup>96</sup> In one case, an employer gave sworn testimony stating that she kept her employees' government-issued Social Security cards because "if they have their Social Security card, they'll leave."<sup>97</sup>

***14(c). What governmental measures have been taken by the federal or state labor departments, to guarantee the observance and compliance with the prohibition against forced labor, particularly the prohibition on retaining immigration documents, on refusing to return the documents and forcing the migrant workers with H-2B visas to remain with an employer against their will?***

Petitioners are not aware of any actions taken by state or federal labor agencies to prevent forced involuntary servitude of H-2B workers nationally.

Petitioners are aware of two instances in which federal agencies have investigated or taken action against individual employers that have held H-2B workers in involuntary servitude. However, in both cases the agencies did not take action to reform the H-2B program to prevent similar abuses from happening in the future.

- A. In spring 2008, more than 500 H-2B workers employed by Signal International in Mississippi filed a lawsuit alleging that they were the victims of human trafficking. Among other things, the workers charge that they were threatened by armed guards, that some were held at gunpoint in locked rooms, and that the employer called their families in India to threaten them. The workers also allege that they paid approximately \$20,000 each to their recruiter. Apparently, the U.S. Department of Justice is conducting a human trafficking investigation regarding the workers' treatment.<sup>98</sup>
- B. In 2006, the federal Equal Employment Opportunity Commission ("EEOC") announced that it had settled a lawsuit it brought on behalf of 48 Thai welders in California on H-2B visas. According to the EEOC, the employer confiscated the workers' passports, restricted their movements, and told some employees that the police and immigration officials would arrest them if they tried to leave. The employer settled the case by agreeing to provide compensation to the workers, to revise the way it treated its workers in the future, and to allow the EEOC to monitor its operations.<sup>99</sup>

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<sup>96</sup> Mary Bauer, *Close to Slavery* (2007), p. 15.

<sup>97</sup> *Id.*

<sup>98</sup> George Joseph, *Signal Workers Take Protest to White House*, *India Abroad* (April 11, 2008); *Workers in Washington to Meet Ronen*, *Hindustan Times* (March 27, 2008).; George Joseph, *Workers Escape "Slavelike" Conditions in Mississippi Company*, *India Abroad* (March 21, 2008).

<sup>99</sup> *EEOC Resolves Slavery and Human Trafficking Suit Against Trans Bay Steel for an Estimated \$1 Million*, U.S. Federal News (Dec. 8, 2006).

**15. Through what mechanism does the federal and/or state labor authority monitor compliance with the federal or state law prohibiting involuntary servitude and/or forced labor, particularly with regard to the prohibition on retaining immigration documents, on refusing to return the documents and forcing a worker with an H-2B visa to remain with the employer against his will?**

To petitioners' knowledge, the U.S. DOL and the state labor authorities do not regard the prohibition on involuntary servitude to be within their enforcement jurisdiction. Instead, these matters are usually pursued by federal and state prosecutors.

**16. From 2003 to date, how many inspections to impose sanctions in the event of noncompliance with the prohibition against forced labor and involuntary servitude have been carried out in work places that use workers with H-2B visas in Idaho, Colorado, Arkansas, Texas, Florida, Oregon, Tennessee and Wyoming? If the abovementioned inspections resulted in penalties, what type and how many? How have the penalties been enforced?**

Petitioners do not know.

**17. Through what free legal mechanism and before which authority, state or federal, can H-2B workers in Idaho, Colorado, Arkansas, Texas, Florida, Oregon, Tennessee and Wyoming go to enforce their right not to perform forced labor, including not having their immigration documents withheld, getting the documents back and not being forced to remain with an employer against their will? What is the legal procedure and before which tribunal can workers with H-2B visas go to enforce their right not to perform forced labor, including not having their immigration documents withheld, getting the documents back and not being forced to remain with an employer against their will in Idaho, Colorado, Arkansas, Texas, Florida, Oregon, Tennessee and Wyoming? From 2003 to date, how many complaints have workers with H-2B visas brought before the labor departments on this matter? How many proceedings have workers with H-2B visas brought before the courts on this matter? How much time does it take the labor departments and courts to resolve the complaints? If these matters have been resolved, how have they been resolved? Of the total number of resolved complaints, how many have been favorable to the worker?**

In order to enforce the right not to perform forced labor, including not having their immigration documents withheld, getting the documents back and not being forced to remain with an employer against their will, an H-2B worker can file a lawsuit in federal or state court. The obstacles to filing such a lawsuit are discussed in response to question 6. Petitioners do not know how many such lawsuits have been filed from 2003 to date.

**18. In which ways do the federal and state labor authorities ensure that workers with H-2B visas have access to the courts to make sure that they are able to enforce their right not to perform forced labor, including not having their immigration documents withheld, getting the documents back and not being forced to remain with an employer against their will in Idaho, Colorado, Arkansas, Texas, Florida, Oregon, Tennessee and Wyoming? How do the labor authorities ensure access to these procedures? How do the labor authorities make sure that workers with H-2B visas know about the existence of these procedures to enforce their rights?**

To petitioners' knowledge, federal and state authorities do not ensure that H-2B workers have access to the courts to enforce the prohibition against forced labor.

**19(a). What are the differences between the treatment of workers who are citizens and H-2B workers regarding the prohibition against forced labor?**

Unlike citizens, who can work for the employer of their choosing, H-2B workers are bound to their employer in that they cannot be legally employed by any employer other than the one who sponsored their entry into the United States. Moreover, unlike citizens, H-2B workers often pay as much as several thousand dollars to recruiters in order to get a job, so that they have an extremely strong financial compulsion to continue working for their H-2B employer in order to earn back that money.<sup>100</sup> Citizens may have access to free legal counsel to address issues regarding the prohibition against forced labor that H-2B workers do not enjoy.

**19(b). What is the difference between workers who are citizens and H-2B workers with respect to access to the courts to enforce their rights? Why do these differences exist, if they do?**

See responses to Questions 6 and 8 above regarding differences in access to legal assistance and to enforcement mechanisms between H-2B workers and citizens.

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<sup>100</sup> Mary Bauer, *Close to Slavery* (2007), pp. 8-14, available at <http://www.splcenter.org/pdf/static/SPLCguestworker.pdf>

## Labor principle 6, minimum working conditions

### A. Wages

20. *What state and/or federal legislation protect the right of the workers with H-2B visas to receive the minimum wage?*

#### Federal legislation:

- A. As discussed in response to question 1(a), the **Immigration Reform and Control Act of 1986** requires employers to pay H-2B workers the “prevailing wage rate,” which is the average wage paid to similarly employed workers in the same occupation and area of intended employment. The prevailing wage rate is established by the State Workforce Agency.
- B. The **Fair Labor Standards Act**, which applies to H-2B workers:
1. Establishes a federal minimum wage, which is currently \$5.85 per hour.<sup>101</sup> Agricultural and domestic workers may be paid a lower minimum wage.<sup>102</sup>
  2. For workers covered by the minimum wage provision, FLSA prohibits deductions made for the primary benefit of the employer (such as deductions for equipment enabling a worker to do his or her job) whenever the deductions cause the worker’s pay to fall below the minimum wage.<sup>103</sup> See response to question 21 for more details.
  3. Requires overtime pay of at least 1.5 times the regular rate of pay for time worked in excess of 40 hours per week.<sup>104</sup> Most agricultural workers are exempt from this overtime requirement.<sup>105</sup>
  4. Prohibits employers from discriminating against or discharging workers who file a complaint or participate in any proceeding under the FLSA.<sup>106</sup>

#### State legislation:

Some states have laws establishing a state minimum wage. When the state minimum wage is higher than the federal minimum wage, FLSA makes the state minimum wage applicable.

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<sup>101</sup> 29 U.S.C. § 206(a)(1). The federal minimum wage will increase to \$6.55 per hour on July 24, 2008 and to \$7.25 on July 24, 2009. *Id.*

<sup>102</sup> 29 U.S.C. § 206(a)(4), (f). A covered employer is generally required to have annual gross volume of sales made or business done of at least \$500,000. Farm workers employed by anyone who used no more than 500 “man-days” of farm labor in any calendar quarter of the preceding calendar year are not subject to the minimum wage provision.

<sup>103</sup> See *Arriaga v. Florida-Pacific Farms, LLC*, 305 F.3d 1228, 1235-36 (11th Cir. 2002); *Caro-Galvan v. Curtis Richardson, Inc.*, 993 F.2d 1500, 1513 (11th Cir. 1993).

<sup>104</sup> 29 U.S.C. § 207(a)(1).

<sup>105</sup> 29 U.S.C. § 213(a)(6).

<sup>106</sup> 29 U.S.C. § 215(a)(3).

Petitioners describe below the minimum wage laws of Arkansas, Colorado, Florida, Idaho, Oregon and Wyoming:

- A. *Arkansas*: The Minimum Wage Act of the State of Arkansas establishes a minimum wage rate of \$6.25.<sup>107</sup> Additionally, non-agricultural workers must be paid at the overtime rate of 1.5 times the normal rate for time worked in excess of 40 hours per week.<sup>108</sup>
- B. *Colorado*: Pursuant to Article XVIII, Section 15 of the Colorado Constitution, the minimum wage is adjusted annually for inflation. As of January 1, 2008, the minimum wage rate is \$7.02.<sup>109</sup>
- C. *Florida*: Pursuant to Article X, Section 24 of the Florida Constitution, the minimum wage is adjusted annually for inflation. As of January 1, 2008, the minimum wage rate is \$6.79 per hour.<sup>110</sup> There is no overtime pay requirement.
- D. *Idaho*: The Idaho Code establishes a minimum wage rate of \$5.85 per hour, which will increase to \$6.55 per hour on July 24, 2008.<sup>111</sup> There is no overtime pay requirement.
- E. *Oregon*: Pursuant to section 653.025 of the Oregon Statutes, the minimum wage is adjusted annually for inflation. As of January 1, 2008, the minimum wage rate is \$7.95 per hour. Overtime pay is required in general after 40 hours per week and after 10 hours a day in nonfarm canneries, driers, or packing plants and in mills, factories or manufacturing establishments (excluding sawmills, planing mills, shingle mills, and logging camps).<sup>112</sup>
- F. *Wyoming*: Wyoming law establishes a minimum wage rate of \$5.15.<sup>113</sup> There is no overtime pay requirement for private employers.

The minimum wage laws of some states, such as Texas,<sup>114</sup> are not applicable to H-2B workers. Other states, such as Tennessee, do not have minimum wage laws.

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<sup>107</sup> Ark. Code Ann. §§ 11-4-210(a).

<sup>108</sup> Ark. Code Ann. § 11-4-211.

<sup>109</sup> Colorado Department of Labor and Employment, Division of Labor, Colorado Minimum Wage Fact Sheet (Nov. 2007), available at <http://www.coworkforce.com/lab/MinimumWageFactSheet.pdf>

<sup>110</sup> Florida Agency for Workforce Innovation, Florida's Minimum Wage, available at [http://www.floridajobs.org/resources/fl\\_min\\_wage.html](http://www.floridajobs.org/resources/fl_min_wage.html)

<sup>111</sup> IDAHO CODE §§ 44-1502.

<sup>112</sup> Or. Rev. Stat. §§ 653.261, 653.265; Or. Admin. R. 839-020-0030.

<sup>113</sup> Wyo. Stat. Ann. § 27-4-202.

<sup>114</sup> The Texas minimum wage law is not applicable to H-2B workers since it excludes from coverage any employment that is subject to the FLSA. Tex. Labor Code § 62.151.

**21. Under state and/or federal legislation can employers take deductions from the wages of workers with H-2B visas? If they may, in what conditions and under what circumstances are deductions allowed?**

Federal legislation:

The Fair Labor Standards Act prohibits deductions made for the primary benefit of the employer – such as deductions for equipment enabling a worker to do his or her job, or visa and transportation fees – whenever those deductions cause the worker’s pay to fall below the minimum wage.<sup>115</sup> If workers have been required to advance those costs prior to the start of work, the employer is required to reimburse them in the first pay period to the extent that deducting the costs paid by the worker from wages earned in the first pay period causes the net wages to fall below the minimum wage.<sup>116</sup> However, the U.S. DOL has declined to enforce this principle for H-2B workers, so that the only way the workers can enforce it is by going to court.<sup>117</sup>

Employers may deduct a specified maximum amount for providing three meals a day, although employers may petition the U.S. DOL for permission to deduct more.<sup>118</sup>

State legislation:

Most states have laws restricting employers from taking deductions from the workers’ wages. For example:

- a. *Idaho*: Deductions from employee paychecks that are neither approved by federal or state law nor authorized in writing by the employee are prohibited.<sup>119</sup>
- b. *Oregon*: Employers can take deductions from employees’ wages only with written authorization from the employee, except for mandatory deductions for taxes.<sup>120</sup> Employers cannot make deductions that bring wages below the state minimum wage, except for deductions for certain facilities or services provided for the private benefit of the employee (not the employer).<sup>121</sup>

**22. What governmental measures have been implemented by the federal and/or state labor departments to guarantee the observance of and compliance with the law that protects the rights of workers with H-2B visas to receive the minimum wage?**

Federal DOL

The process that employers must follow to register for certification as an H-2B employer is described above in response to question 2(a). The federal government relies largely on self-

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<sup>115</sup> *Arriaga*, 305 F.3d at 1228, 1235-36; *Caro-Galvan*, 993 F.2d at 1500, 1513.

<sup>116</sup> *Id.*

<sup>117</sup> *See Luna-Guerrero v. N.C. Grower’s Assn.*, 370 F. Supp.2d 386, 390 (E.D.N.C. 2005).

<sup>118</sup> 20 C.F.R. § 655.211(a).

<sup>119</sup> IDAHO CODE § 45-609(1).

<sup>120</sup> OR. REV. STAT. § 652.610.

<sup>121</sup> *See* OR. REV. STAT. § 653.025; OR. ADMIN. R. 839-020-0025.

reporting by employers and does very little affirmative enforcement. Employers seeking to employ H-2B workers must attest to their State Workforce Agency (SWA) and to the U.S. DOL that the workers will be paid at least the prevailing wage for the occupation in the area of intended employment.<sup>122</sup> For the reasons stated below, neither SWA nor DOL review is adequate to ensure that H-2B workers will actually be paid either the prevailing wage or even the minimum wage.

A U.S. DOL guidance instructs SWA's to review the employer's application to ensure that the employer promises to pay at least the prevailing wage.<sup>123</sup> Additionally, for H-2B workers in tree planting and related reforestation occupations, the SWA must ensure that applications comply with two additional requirements: 1) that the employer guarantees the prevailing wage rate for any workers to be paid on a piece rate basis, and 2) that "all deductions (including housing, transportation, meals, tools, safety equipment, etc.) . . . are allowable in accordance with the Fair Labor Standards Act."<sup>124</sup> However, for H-2B's working in all other occupations the SWA is not required to ensure that these requirements are met.<sup>125</sup> Moreover, as discussed in response to question 2(a), SWA's tend to be thinly staffed, making it difficult for them to adequately scrutinize employers' applications.

The SWA forwards the application to a DOL office known as a "National Processing Center." The National Processing Center is required to ensure that the employer promises to pay at least the prevailing wage. However, for several reasons, the National Processing Center review is not adequate to ensure that employers will actually pay the prevailing wage:

- A. The National Processing Center is not required to ensure either that the employer guarantees the prevailing wage rate for any workers to be paid on a piece rate basis, or that any deductions do not bring the worker's compensation below the minimum wage for the first pay period.<sup>126</sup> Indeed, as discussed above in response to Question 21, the DOL has refused to enforce the federal courts' ruling that the Fair Labor Standards Act bars deductions made for the employer's benefit if the deductions bring the worker's compensation below the minimum wage for the first pay period.
- B. As discussed in response to question 2(a), the National Processing Centers are overburdened and understaffed.
- C. As discussed above in response to question 2(a), one of the National Processing Centers has ignored reports of possible fraud and other problems sent to it by the local State Workforce Agency.

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<sup>122</sup> 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6)(iv); 20 C.F.R. § 655 *et seq.*

<sup>123</sup> U.S. Department of Labor, Employment & Training Advisory System, Foreign Labor Certification Training and Employment Guidance Letter No. 21-06, Change 1, Attachment sec. IV (June 25, 2007).

<sup>124</sup> 72 Fed. Reg. 36504, 36507 (July 3, 2007).

<sup>125</sup> U.S. Department of Labor, Employment & Training Advisory System, Foreign Labor Certification Training and Employment Guidance Letter No. 21-06, Attachment sec. IV (April 4, 2007).

<sup>126</sup> U.S. Department of Labor, Employment & Training Advisory System, Foreign Labor Certification Training and Employment Guidance Letter No. 21-06, Attachment sec. V (April 4, 2007).

The final decision about whether to grant an H-2B visa is made by U.S. Citizenship and Immigration Services. As discussed in response to question 2(a), that agency does not scrutinize the application for compliance with minimum wage requirements or other labor laws.

As discussed above in response to question 2(c), once an employer has received clearance to hire H-2B workers, the federal DOL generally does not conduct worksite visits or take any other affirmative action to ensure that the employer is actually paying the required wage.

If an H-2B worker files a complaint with the federal DOL regarding nonpayment of the minimum wage in violation of FLSA, the DOL may recover back wages either administratively or through court action. The barriers to H-2B workers filing such complaints are discussed in response to questions 2(c) and 6.

### State DOLs

State DOLs or equivalent agencies enforce the minimum wage for workers in their states. However, as discussed in response to question 2(a), underfunding and staffing shortages generally prevent these agencies from carrying out this duty in a timely manner.

**23. *How do the federal and state labor departments monitor compliance with this law, concerning the payment of the minimum wage to H-2B workers? How does the labor department ensure that with the deductions made by the employer, H-2B workers are not paid less than the minimum wage?***

See response to Question 22.

**24. *From 2003 to date, how many inspections to impose sanctions in the event of minimum wage violations have been conducted in workplaces that employ H-2B workers? If the inspections resulted in penalties, what type and how many? Have the sanctions been enforced?***

As discussed in response to question 2(c), it is petitioners' understanding that federal and state DOL's generally do not conduct inspections to ensure that H-2B workers are being paid the minimum wage.

In isolated instances, when prompted by the workers' own lawsuit or media attention, the U.S. Department of Labor may conduct an investigation into an individual employer. For example, the Department of Labor began an investigation in April 2007, after twelve H-2B workers from Guatemala filed a federal lawsuit against the nursery that employed them, and against its labor contractor. The workers alleged that the employer and labor contractor confiscated their passports, paid them far less than the legally required minimum wage, and threatened them with

retaliation if they complained. The Department of Labor eventually filed its own lawsuit against the employer, claiming wage and hour violations.<sup>127</sup>

**25(a). Through what free legal mechanism and before which federal or state department can H-2B workers enforce their right to receive the minimum wage in Idaho, Colorado, Arkansas, Texas, Florida, Oregon, Tennessee and Wyoming? What is the legal procedure and before which courts can H-2B workers go to enforce their right to receive a minimum wage in Idaho, Colorado, Arkansas, Texas, Florida, Oregon, Tennessee and Wyoming?**

There are three ways workers can enforce their right to a minimum wage:

- A. H-2B workers may file an action in federal or state court. The barriers to H-2B workers going to court are discussed in response to question 6.
- B. H-2B workers may file a complaint under the Fair Labor Standards Act at the local office of the U.S. DOL. The barriers to H-2B workers filing such complaints are discussed in response to questions 2(c) and 6.
- C. H-2B workers may file a complaint under the Fair Labor Standards Act at their state DOL. H-2B workers also may file a complaint at their state DOL regarding violations of the state minimum wage law in the states in which a state minimum wage law exists. The barriers to H-2B workers filing complaints with their state DOLs are discussed in response to questions 2(c) and 6.

**25 (b). From 2003 to date, how many complaints have been filed with the labor departments by H-2B workers related to the right to receive the minimum wage?**

Petitioners do not know.

**25(c). How many of this type of complaint have been brought before the courts by H-2B workers?**

Petitioners do not know the total number of complaints, but are aware of many examples. A few are listed below:

- A. *De Leon-Granados v. Eller & Sons*: In June 2005, four H-2B workers sued their employer, Eller & Sons, in federal court for a variety of wage-related reasons, including failure to pay the minimum wage. The workers, who were employed in forestry, sued on behalf of the class of approximately 1,500 H-2B workers employed by Eller & Sons since 1999. The workers alleged, among other things, that the employer had not paid them the promised wage, had not paid them the prevailing wage, had not paid overtime, and had not paid the federal minimum wage. In some instances, the workers alleged, they were

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<sup>127</sup> Nina Bernstein, *Suit Charges That Nursery Mistreated Laborers*, N.Y. Times (Feb. 8, 2007); U.S. DOL, Press release: U.S. Department of Labor sues Connecticut and North Carolina companies for alleged violations of federal migrant labor, wage and hour laws (April 9, 2007).

paid only \$25 a day for 12-13 hours of work. The workers claimed that the wage violations resulted in part from the employer's practice of taking deductions from the employees' paychecks for expenses that were incurred primarily for the employer's benefit, and from deductions that brought the workers' wages below the minimum wage. The case is still pending.

- B. *Rosiles-Perez, et al. v. Superior Forestry Service Inc.*: In January 2006, H-2B workers filed a class action lawsuit in federal court in Tennessee, alleging violations of the statutory minimum wage and overtime protections, a breach of the work agreement, and other violations of the Migrant and Seasonal Agricultural Worker Protection Act, and from deductions that brought the workers' wages below the minimum wage. The case is still pending.

**25(d). How much time does it take the labor authorities and the court to resolve these complaints and cases? If the complaints have been resolved, what were the outcomes?**

Resolution of H-2B complaints and cases may take many months or even years. Here are several examples:

- A. As described in Petitioners' original Petition and Memorandum of Law, Petitioner Perez and five other men with H-2B visas, together with the Idaho Department of Labor, filed labor law complaints against Universal Forestry in the fall of 2000. The U.S. DOL did not investigate these complaints for almost 10 months, and it took almost two years for the U.S. DOL to complete its inquiry. By the time the U.S. DOL sought a reply from Universal Forestry, the H-2B workers had moved on.
- B. *De Leon-Granados v. Eller & Sons*, which is described in response to question 25(c), has been pending in federal court for almost three years.
- C. *Rosiles-Perez, et al. v. Superior Forestry Service Inc.*, which is described in response to question 25(c), has been pending in federal court for more than two years.

In addition to the passage of time, an additional obstacle to resolution of workers' complaints is the failure of federal and state labor authorities to make accommodations for the fact that H-2B workers regularly work away from home, are unable to check and reply to mail within short time periods, and are often unable to get to a telephone during regular business hours.

**25(e). Of all of the complaints resolved, how many were favorable to the worker?**

Petitioners do not know.

**25(f). What is the amount of the recovered wages?**

Petitioners do not know.

**26. How do the state and federal labor authorities ensure that H-2B workers have access to the courts to ensure that workers are able to enforce their right to a minimum wage? How do the labor authorities ensure access to the courts for this purpose? How do the federal and**

*state labor authorities ensure that H-2B workers know about the existence of these procedures to ensure their right to the minimum wage?*

See response to Question 6.

**27. *What is the difference between the right of workers who are citizens and H-2B workers with regard to enforcing their right to the minimum wage? And with respect to their access to the courts to enforce these rights? If there is a difference, why does it exist?***

See responses to Questions 6 and 8 above regarding differences in access to legal assistance and to enforcement mechanisms.

### **B. Housing**

**28. *Under what state or federal legislation can employers take deductions for rent from the wages of workers with H-2B visas?***

Aside from provisions, discussed above in response to Question 21, requiring that such deductions be disclosed in advance, agreed to in writing by the worker, and not violate the minimum wage laws, there is no specific prohibition against deducting rent from wages. The housing must be lawfully provided. In other words, it must be registered if state law requires, and comply with minimum health and safety requirements. The employer cannot charge more than the fair market rent or actual cost, whichever is less.<sup>128</sup>

**29. *What federal or state legislation provides H-2B workers with a right to decent housing? Must it be provided for free? If not, what is the legal basis for such impediment?***

Nothing in the H-2B program's regulatory provisions requires that workers be provided with housing. However, if an employer promises to do so, it must do so, and the housing provided must meet minimum health and safety standards.

If workers are housed in temporary work camps, the housing generally must comply with the standards set forth under the Occupational Health and Safety Act, at 29 C.F.R. § 1910.142.

As discussed in response to question 1(a), for H-2B workers who do reforestation, food processing, and perhaps seafood processing, the Migrant and Seasonal Agricultural Worker Protection Act requires that when employers provide them with housing, that housing must meet federal, state and local health and safety standards. Housing provided by the employer must be safe and adequate, with heat, restrooms, cooking facilities, and weatherproofing. The housing must also comply with the health and safety codes applicable to all landlords in the region.

**30. *What measures have the federal and state labor departments taken to guarantee the observance of and compliance with rules governing H-2B workers' housing?***

The U.S. DOL is responsible for inspecting and enforcing the federal Occupational Safety and Health Administration standards for temporary labor camps discussed in response to question 29.

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<sup>128</sup> 29 U.S.C. § 203(m); 29 C.F.R. § 531.33.

As discussed in response to question 1(a), for H-2B workers employed in forestry, food processing, and possibly also seafood processing, the Migrant and Seasonal Agricultural Worker Protection Act requires that the housing be certified as compliant with applicable safety and health codes before it can be occupied.

State DOL's are also responsible for enforcing federal and state requirements regarding workers' housing. However, there is little evidence that such inspections are routinely carried out, either by the federal or state DOL's.

**31. Through what measures does the federal or state labor department monitor compliance with the rules governing H-2B workers' housing?**

See response to Question 30.

**32. From 2003 to date, how many inspections to impose sanctions in the event of a violation of the rules governing the right of H-2B workers to housing have been carried out in work places that use H-2B workers? If these inspections have resulted in penalties, what type and how many? How have the penalties been enforced?**

Unknown.

**33(a). Through what free legal mechanism and before what federal or state authority can H-2B workers enforce their right to free and decent housing in Idaho, Colorado, Arkansas, Texas, Florida, Oregon, Tennessee and Wyoming? What is the legal process and before what court can H-2B workers go to enforce their right to free and decent housing in Idaho, Colorado, Arkansas, Texas, Florida, Oregon, Tennessee and Wyoming?**

H-2B workers enjoy no right to free housing. To enforce the federal and state requirements that if housing is provided it comply with applicable health and safety codes, a worker can make a complaint to the U.S. DOL, or to the state occupational safety and health agency, which can fine the employer, but cannot provide any remedy to worker.

H-2B workers employed in forestry, food processing, and possibly also seafood processing, can file a lawsuit under the Migrant and Seasonal Agricultural Worker Protection Act in federal or state court. However, the obstacles to obtaining counsel, and to filing such a lawsuit without the assistance of counsel, are discussed in response to questions 6 and 8.

**33(b). From 2003 to date, how many complaints have been brought by H-2B workers before the labor department with respect to violations of housing rules? What complaints have been filed by H-2B workers with the courts on this subject? How much time does it take the labor authorities and courts to resolve the complaints and proceedings? If the complaints before the labor authorities have been resolved, what have been the outcomes? Of the total number of resolved complaints, how many have been favorable to the worker?**

Petitioners do not know.

**34. How do the federal and state labor authorities ensure that H-2B workers have access to these court proceedings to ensure their housing rights? How do the federal and/or state labor**

*departments ensure access to these procedures? How do federal and/or state labor authorities makes sure that H-2B workers understand the existence of these proceedings to enforce their labor rights?*

See responses to Questions 6 and 8.

### **C. Transportation**

**35. Under federal and/or state law, can employers take deductions from H-2B workers' wages for transportation to and from the work place?**

See response to Question 21. In addition, H-2B employers enter into assurances, as a condition of receiving the right to import H-2B workers, that they will comply with all federal, state or local laws. Some of the countries from which H-2B workers are recruited have domestic requirements that employers pay transportation costs.<sup>129</sup>

**36. What federal and/or state legislation provides H-2B workers with the right to free and safe transportation to and from the workplace? If there is none, what is the legal basis for this? Does it provide for transportation from the H-2B worker's place of origin to the place of work and then back to the place of origin?**

There is no legislation requiring employers to transport H-2B workers to and from the workplace. The only relevant legislation, described below, pertains to the safety of any transportation that the employers provide.

As discussed above in response to question 1(a), for workers in the reforestation, food processing, and perhaps seafood processing industries, the Migrant and Seasonal Agricultural Worker Protection Act requires an employer who transports workers to do so in vehicles that meet health and safety requirements, including having insurance for the vehicle, being driven by a licensed driver and complying with occupancy limits.

**37. What measures have the federal or state labor departments implemented to guarantee the observance of and compliance with the law that provides H-2B workers with free and safe transportation to the work place?**

Petitioners do not know.

**38. What mechanisms do the federal and/or state labor departments use to monitor compliance with this law, with regard to providing free and safe transportation to H2-B workers?**

Petitioners do not know.

**39. From 2003 to date, how many inspections have been undertaken to impose sanctions in the event of violations of this law in workplaces that employ H-2B workers? If these**

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<sup>129</sup> See, e.g., Artículo 28, Ley Federal de Trabajo de México.

*inspections resulted in penalties, what type and how many? Have the penalties been enforced?*

Petitioners do not know.

**40.** *Through what free legal mechanisms and before what federal or state authority can H-2B workers enforce their right to not to have the costs of transportation to the workplace deducted from their wages in Idaho, Colorado, Arkansas, Texas, Florida, Oregon, Tennessee and Wyoming? What is the legal proceeding and before which court can H-2B workers go to enforce their right to not have the costs of transportation to the workplace deducted from their wages in Idaho, Colorado, Arkansas, Texas, Florida, Oregon, Tennessee and Wyoming?*

See response to Question 25.

**40(a).** *From 2003 to date, how many H-2B workers have filed complaints with the labor department regarding the violation of their right not to have the costs of transportation to the workplace deducted from their wages? How many proceedings have been brought in the courts by H-2B workers in this respect? How much time does it take the labor departments and courts to resolve the complaints and procedures that are brought? If the complaints brought before the labor departments have been resolved, what were the outcomes? Of the resolved complaints, how many have been favorable to the worker?*

For examples of several such cases, see response to question 25(c).

**41.** *How do the federal and state labor departments make sure that H-2B workers have access to the courts to enforce their rights to free and safe travel? How do the federal and/or state labor departments ensure access to these procedures? How do federal and/or state labor departments make sure that the workers with H-2B visas know about the existence of these procedures to enforce their right to free and safe transportation?*

To petitioners' knowledge, they do not do so.

#### **D. Work contract**

**42.** *What federal and/or state legislation states that employers and workers with H-2B visas must sign a work contract? What minimum conditions must be addressed in the contract? When must the contract be signed?*

As discussed in response to question 2(a), the U.S. DOL requires an employer to fill out a form in order to apply for certification as an H-2B employer. The form requires the employer to specify the job duties, hours of employment each week, daily work schedule, rate of pay, where the work will be performed, and how long the job will last. Once the employer's form is approved by the U.S. DOL, it is considered to be part of an enforceable contract.<sup>130</sup>

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<sup>130</sup> Arriaga, 305 F.3d at 1228, 1233 n.5; Andrew J. Elmore, *Egalitarianism and Exclusion: U.S. Guest Worker Programs and a Non-Subordination Approach to the Labor-Based Admission of Nonprofessional Foreign Nationals*, 21 Georgetown Immig. L. J. 521, 539 (2007).

Additionally, as discussed in response to question 1(a), for H-2B workers in the reforestation, food processing, and perhaps seafood processing industries, the Migrant and Seasonal Agricultural Worker Protection Act requires disclosure of the terms of employment, and requires the employer to comply with the “working arrangement,” including the terms disclosed and assurances made to the U.S. DOL.

As discussed in response to question 1(a), Oregon’s farm labor contractor act requires forestry contractors to sign a contract with the workers containing specified terms and conditions prior to beginning work.<sup>131</sup>

Despite these protections, the Southern Poverty Law Center reports that “[i]t is extremely common for seafood processing employers to seek more laborers than they can use. They routinely apply for workers in their plants for periods longer than needed for their seasons, as they are unsure exactly when their season will begin or end. As a result, many guestworkers have no work for three or four weeks at the beginning or end of their visa term.”<sup>132</sup>

One recent case regarding an H-2B worker who was not provided with the amount of work she was promised concerns a woman from Dominican Republic who was recruited to work in a hotel in New Orleans in 2006. The recruiter told her she would be able to work overtime, and would be paid double for holidays. Based on this promise, she paid \$4,000 to get the job and the necessary visa. She and her mother also promised to pay \$10,000 if she did not finish the contract. When she arrived in Louisiana, she was given full-time work for only one month. After that, her hours decreased until she was working only 15-20 hours each week.<sup>133</sup>

**43. *Through what mechanism does the federal and/or state labor department monitor compliance with the requirements for minimum working conditions, with regard to ensuring that there is a work contract stipulating minimum conditions for H-2B workers and that it is signed appropriately?***

As described in the responses to Questions 2(a) and 2(c), the federal and state DOL’s loosely review the employers’ applications for certification as an H-2B employer. However, as discussed in response to Question 2(c), the federal DOL takes the position that it lacks the authority to enforce the actual terms of the contract.

**44. *From 2003 to date, how many inspections have been undertaken to impose sanctions in the event of a violation of the requirement of adequate work contracts in workplaces that use H-2B workers? If these inspections have led to penalties, what type and how many? Have the penalties been enforced?***

Petitioners do not know.

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<sup>131</sup> Or. Rev. Stat. § 658.440(1)(g);

[http://www.foreignlaborcert.doleta.gov/pdf/OFLC\\_Briefing\\_May\\_sessions\\_FINAL.pdf](http://www.foreignlaborcert.doleta.gov/pdf/OFLC_Briefing_May_sessions_FINAL.pdf).

<sup>132</sup> Mary Bauer, *Close to Slavery: Guestworker Programs in the United States*, Southern Poverty Law Center (2007), at 23.

<sup>133</sup> The story of this H-2B worker, who does not wish to be identified, is told in Mary Bauer, *Close to Slavery: Guestworker Programs in the United States*, Southern Poverty Law Center (2007), at 23.

***45(a). Through what free legal mechanisms and before what federal or state authority can H-2B workers ensure that their right to a work contract is honored in Idaho, Colorado, Arkansas, Texas, Florida, Oregon, Tennessee and Wyoming? What is the proceeding and before which court can H-2B workers ensure that their right to a work contract is honored in Idaho, Colorado, Arkansas, Texas, Florida, Oregon, Tennessee and Wyoming?***

H-2B workers covered by the Migrant and Seasonal Agricultural Worker Protection Act can file a complaint under that Act with the U.S. DOL or their state DOL. They can also sue for violation of that Act.

H-2B workers not covered by the Migrant and Seasonal Agricultural Worker Protection Act have no federal remedy. H-2B workers working in forestry in Oregon can file a complaint with the Oregon Bureau of Labor and Industries or a private lawsuit under that state's contractor registration law. For the most part, all other H-2B workers must file a breach of contract claim in state court.

***45(b). From 2003 to date, how many complaints have been filed by H-2B workers before the appropriate labor department with respect to the guarantee of a work contract that stipulates minimum work conditions? How many complaints have H-2B workers filed with courts in this regard? How much time does it take the labor departments and the courts to resolve the complaints and proceedings? If the complaints before the appropriate labor departments have been resolved, what were the outcomes? Of the total number of resolved complaints, how many have been favorable to the worker?***

Petitioners do not know.

***46. How does the federal or state labor department make sure that workers with H-2B visas have access to these proceedings to enforce their right to a work contract that stipulates their working conditions? How does that federal and/or state labor authority ensure access to these procedures? How does the federal and/or state labor authority make sure that H-2B workers know about the existence of these proceedings to enforce their right to a work contract that stipulates the conditions of work and to ensure that this right is fulfilled?***

To petitioners' knowledge, they do not do so.

***47. What are the differences between the treatment of workers who are citizens and H-2B workers with respect to the right to a work contract? And with respect to access to the labor tribunals to enforce their rights? Why does this difference occur, if it does?***

See responses to Questions 6 and 8 above regarding differences in access to legal assistance and to enforcement mechanisms.

### E. Period of employment

#### **48. Under what federal and/or state law can employers end the work of workers with H-2B visas? If they can, under what circumstances and reasons?**

As discussed in response to question 1(a), unlike the H-2A program, which guarantees that three-quarters of the work promised by the contract will be completed, H-2B workers do not have a regulatory or statutory guarantee of work for any set period of time. Nonetheless, an H-2B worker's contract for employment is for a specified time and, as discussed in response to Question 42 above, should be enforceable in most circumstances under state contract laws.

See response to Question 42 for a discussion of the frequency with which employers fail to provide H-2B employees with work for the full period of the H-2B visa.

#### **49. What federal and/or state legislation provides for the right of H2-B workers to count on work with the employer they contracted with for the entire period of their H2-B visa?**

##### Federal legislation:

As discussed in response to question 1(a), for H-2B workers covered by the Migrant and Seasonal Agricultural Worker Protection Act (those employed in forestry and agricultural food processing, and possibly also those employed in seafood processing), each farm labor contractor, agricultural employer and agricultural association which recruits them is required to disclose in writing the period of employment for which the worker is being recruited.<sup>134</sup> Furthermore, the Migrant and Seasonal Agricultural Worker Protection Act prohibits the farm labor contractor, agricultural employer or agricultural association from violating any provision of the contract, including the provision covering the period of employment, without justification.<sup>135</sup>

For H-2B workers not covered by the Migrant and Seasonal Agricultural Worker Protection Act, federal legislation does not provide any right to count on work with the employer with whom they contract.

##### State legislation:

In Oregon, farm labor contractors using farm workers, including forestry workers, are required to execute a contract containing the "term and conditions of employment, including the approximate length of season or period of employment and the approximate starting and ending dates thereof."<sup>136</sup> Furthermore, employers are required to provide to each worker, at the time of hiring, recruitment, solicitation or supplying, a written statement outlining the approximate length or period of employment.<sup>137</sup>

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<sup>134</sup> 29 U.S.C. § 1821(a)(4).

<sup>135</sup> 29 U.S.C § 1822(c).

<sup>136</sup> OREGON REV. STAT. § 658.440(1)(g). See OREGON REV. STAT. § 658.440(1)(f)(E).

<sup>137</sup> OREGON REV. STAT. § 658.440(1)(f)(E).

**50. What measures have the federal and/or state labor department implemented to guarantee the observance of and compliance with this law, regarding the right of H-2B workers to count on work for the entire period of use of their H-2B visa?**

As discussed above in response to question 2(a), in order to obtain certification as an H-2B employer, each employer must assure the U.S. DOL that “the job opportunity’s terms [and] conditions . . . are not contrary to Federal, State or local law.” However, as discussed above in response to Questions 2(a) and 2(c), the U.S. DOL lacks the resources to scrutinize these statements carefully and largely relies on self-reporting by the employers. Moreover, as discussed in response to Question 6, once an employer has been certified as an H-2B employer, the U.S. DOL takes the position that it lacks the authority to investigate violations of the terms of the employment contracts entered into by H-2B workers.

**51. Through what mechanism does the federal and/or state labor department monitor the fulfillment of this law, regarding the right of H-2B workers to count on work for the entire period of their H-2B visa?**

To petitioners’ knowledge, they do not do so.

**52. From 2003 to date, how many inspections have been conducted to impose sanctions in the event of a violation of this law in workplaces that use workers with H-2B visas? If these inspections resulted in penalties, what type and how many? Have the penalties been enforced?**

Petitioners do not know.

**53(a). Through what free legal mechanism, and before which federal or state authority, can H-2B workers enforce their right to have work for the entire period of their H-2B visa in Idaho, Colorado, Arkansas, Texas, Florida, Oregon, Tennessee and Wyoming? What is the legal procedure and before which court can H-2B workers enforce their right to have work for the entire period of use of their H-2B visa in Idaho, Colorado, Arkansas, Texas, Florida, Oregon, Tennessee and Wyoming?**

H-2B workers covered by the Migrant and Seasonal Agricultural Worker Protection Act can file a complaint under that Act with the U.S. DOL or their state DOL. They can also sue for violation of that Act.

H-2B workers not covered by the Migrant and Seasonal Agricultural Worker Protection Act have no federal remedy. H-2B workers working in forestry in Oregon can file a complaint with the Oregon Bureau of Labor and Industries. For the most part, all other H-2B workers must file a breach of contract claim in state court in order to enforce their right to have work for the entire period of their visa.

**53(b). From 2003 to date, how many complaints have been filed by H-2B workers before the labor department, with respect to not having work for the entire period of use of the H-2B visa? How many court complaints have been filed by H-2B workers with respect to this issue? How much time does it take the labor departments and the courts to resolve these issues? If the complaints before the labor departments have been resolved, what have been the**

*outcomes? Of the total number of resolved complaints, how many have been favorable to the worker?*

Petitioners do not know.

**54. *How does the federal or state labor department ensure that workers with H-2B visas have access to court proceedings to enforce their right to have work for the entire period of their H-2B visa? How does the federal and/or state labor department ensure access to these procedures? How do federal and/or state labor authorities make sure that H-2B workers know about the existence of the procedures to enforce their right to have work for the entire period of use of their H-2B visa?***

To petitioners' knowledge, they do not do so.

**55. *What are the differences between the treatment of national workers and H-2B workers regarding their ability to count on work for the entire period of a contract? And with respect to accessing the courts to enforce their rights? Why is there this difference, if it exists?***

See responses to Questions 6 and 8.

## Labor principle 7, elimination of discrimination

### ***56(a). What federal and/or state law provides for the prohibition against employer discrimination against H-2B workers and workers who are citizens?***

There are no federal or state laws specifically barring employers from treating citizens more favorably than H-2B workers. As described below, however, there are federal and state laws prohibiting discrimination on the basis of an employee's national origin, race, gender, religion, age (for employees older than 40 years old), or disabilities. There are also state laws prohibiting discrimination on the basis of other factors, such as sexual orientation.

#### Federal law

Various federal laws that prohibit discrimination are applicable to both U.S. citizens and H-2B workers:

- A. Title VII of the **Civil Rights Act of 1964** prohibits U.S. employers from discriminating based on criteria such as national origin, race, gender and religion.<sup>138</sup> Although an employer may not discriminate against an alien based on any of the prohibited criteria, the U.S. Supreme Court has held that intentional discrimination based on alienage (i.e., a person's citizenship status), is not actionable under Title VII.<sup>139</sup>
- B. The **Age Discrimination in Employment Act** prohibits age discrimination against employees who are older than 40 years old.<sup>140</sup>
- C. The **Americans with Disabilities Act** prohibits discrimination against employees with physical or mental disabilities.<sup>141</sup>
- D. The **Equal Pay Act** prohibits employers from paying men and women different wages when they are working in similar conditions and are required to have the same skills.<sup>142</sup>

#### State law

The individual states have enacted anti-discrimination laws based on Title VII.<sup>143</sup> Some prohibit discrimination on grounds that the federal government does not prohibit. For example, Oregon

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<sup>138</sup> 42 U.S.C. § 2000(e) *et seq.*

<sup>139</sup> *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973).

<sup>140</sup> 29 U.S.C. §§ 621 to 634.

<sup>141</sup> 42 U.S.C. § 12101.

<sup>142</sup> 29 U.S.C. § 206.

<sup>143</sup> For example, Section 21.051 of the Texas Labor Code, is intended to carry out the policies of Title VII of the Civil Rights Act of 1964 and its subsequent amendments and secure freedom from discrimination in certain employment transactions. Likewise, Section 760.10 of the Florida Civil Rights Act prohibits an employer from discharging, refusing to hire or classifying employees or applicants for employment on the basis of race, color, religion, sex, national origin, age, handicap or marital status.

law prohibits discrimination on the basis of sexual orientation or marital status, and prohibits age discrimination against employees 18 years old or older.<sup>144</sup>

**56(b). What employer conduct in this regard does the law specifically prohibit?**

See response to question 56(a).

**57. What governmental measures have been implemented by the federal and/or state labor departments to guarantee the observance of and compliance with the prohibition on discrimination against H-2B workers?**

An employee who has been discriminated against in violation of federal law can file a complaint with the federal Equal Employment Opportunity Commission. An employee who has been discriminated against in violation of state law can file a complaint with the appropriate state agency. For example, employees in Oregon can file a complaint with the Bureau of Labor and Industries. Employees in Texas can file a complaint with the Civil Rights Division of the Texas Workforce Commission. Employees can also file a lawsuit in federal or state court.

**58. Through what mechanism do federal and/or state labor authorities monitor the fulfillment of the prohibition on discrimination against H-2B workers?**

See response to question 57.

**59(a). From 2003 to date, how many inspections to impose sanctions in case of a violation of this rule have taken place in workplaces that employ workers with H-2B visas?**

Petitioners do not know.

**59(b). How many inspections have resulted in penalties, what type and how many? Have the penalties been effective?**

Petitioners do not know.

**60(a). With what free legal mechanism and before which federal or state authority can H-2B workers enforce their right not to be discriminated against in Idaho, Colorado, Arkansas, Texas, Florida, Oregon, Tennessee and Wyoming?**

See response to question 57.

**60(b). What is the legal proceeding and before which court can H-2B workers go to enforce their right not to be discriminated against in Idaho, Colorado, Arkansas, Texas, Florida, Oregon, Tennessee and Wyoming?**

See response to question 57.

**60(c). From 2003 to date, how many complaints have been filed before labor departments by H-2B workers with respect to discrimination? How many court complaints have been filed by**

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<sup>144</sup> Or. Rev. Stat. § 659A.030.

***workers with H-2B visas on this issue? How much time does it take the labor departments and courts to resolved the presented complaints? If the complaints before the labor departments have been resolved, what were the outcomes? Of the total of the resolved complaints, how many have been favorable to the worker?***

Petitioners do not know the total number of administrative and court complaints that have been filed. Petitioners are aware of several cases, including the following:

- A. *Olvera-Morales v. International Labor Management Corporation, Inc.* In this case, a Mexican woman who applied for a job with a labor recruiter in 1999, charges that she was employed as an H-2B worker, while men applying for jobs with the same labor recruiter were employed as H-2A workers. She filed a complaint with the federal Equal Employment Opportunity Commission in 2000. In 2002, she filed a class action suit in federal court in North Carolina. That case is still pending.<sup>145</sup>
- B. In 2006, the federal Equal Employment Opportunity Commission (“EEOC”) announced that it had settled a lawsuit it brought on behalf of 48 Thai welders in California on H-2B visas.<sup>146</sup> Among the EEOC’s charges were that the workers were exploited because of their national origin. The employer settled the case by agreeing to provide compensation to the workers, to revise the way it treated its workers in the future, and to allow the EEOC to monitor its operations.<sup>147</sup> However, no steps were taken by the EEOC or any other government agency to reform the H-2B program to prevent other employers from committing similar abuses in the future.

61. How do federal or state labor departments make sure that H-2B workers are not discriminated against? How do the federal and state labor departments ensure access to these procedures? How do federal and/or state labor departments ensure that H-2B workers know about procedures to enforce their rights not to be discriminated against?

See responses to Question 57 and 60(c).

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<sup>145</sup> *Federal Title VII Covered Guest Worker Who Claimed Sex Discrimination Occurred Outside U.S. Borders*, N.C. Lawyers Weekly (Jan. 14, 2008).

<sup>146</sup> This case is also discussed in response to question 14(c).

<sup>147</sup> *EEOC Resolves Slavery and Human Trafficking Suit Against Trans Bay Steel for an Estimated \$1 Million*, U.S. Federal News (Dec. 8, 2006).

**Labor principles 9, prevention of work-related injuries and diseases; and 10, indemnification in the cases of work-related injuries or diseases**

**62. What federal and/or state legislation provides H-2B workers with the right to have measures in place to protect them from injuries and diseases in their workplace?**

Federal legislation:

The Occupational Safety and Health Act of 1970, which is the primary federal law governing occupational health and safety in the private sector, requires employers to:

- A. Maintain conditions or adopt practices reasonably necessary and appropriate to protect workers on the job;
- B. Be familiar with and comply with standards applicable to their establishments; and
- C. Ensure that employees have and use personal protective equipment when required for safety and health.<sup>148</sup>

State legislation:

The federal Occupational Safety and Health Act permits and encourages states to adopt their own occupational safety and health plans, so long as the state standards and enforcement “are or will be at least as effective in providing safe and healthful employment” as the Act. As of 2007, 22 states and territories operated occupational safety and health plans that covered the private sector.<sup>149</sup>

**63. What federal and/or state legislation provides H-2B workers with the right to count on indemnification for injuries and diseases in their workplace?**

Workers’ compensation schemes are run by the various states. In most states, H-2B workers are entitled to workers’ compensation benefits on the same basis as other workers. However, it can be difficult or impossible for H-2B workers to retain their workers’ compensation benefits when they leave the United States.<sup>150</sup> Many H-2B workers are reluctant to file claims because they may end up being blacklisted by H-2B employers if they do so.<sup>151</sup>

**64. What governmental measures have the federal and/or state labor departments taken to guarantee the observance of and compliance with the laws that allow workers to count on**

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<sup>148</sup> Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (1970); Occupational Safety and Health Administration. *All About OSHA*. OSHA 3302-06N. Washington, D.C.: U.S. Department of Labor, 2006, at <http://www.osha.gov/Publications/3302-06N-2006-English.html>.

<sup>149</sup> Occupational Safety and Health Administration. *All About OSHA*. OSHA 3302-06N. Washington, D.C.: U.S. Department of Labor, 2006, at <http://www.osha.gov/Publications/3302-06N-2006-English.html>.

<sup>150</sup> Mary Bauer, *Close to Slavery: Guestworker Programs in the United States* (2007), pp. 25-26, available at <http://www.splcenter.org/pdf/static/SPLCguestworker.pdf>

<sup>151</sup> *Id.*

*protection from injuries and diseases in the workplace, such as indemnification in these cases?*

State occupational safety and health agencies do some limited inspections of workplaces.

**65. Through what mechanisms do the federal and/or state labor departments monitor the fulfillment of this law, with regard to providing a safe work place to H-2B workers?**

See response to question 64.

**66. From 2003 to date, how many inspections have been conducted to impose sanctions in the event of a breach of an employer's obligation to establish a mechanism to prevent injury and disease in workplaces with H-2B workers? If these inspections resulted in penalties, what type and how many? Have the penalties been effective?**

Petitioners do not know.

**67(a). Through what free legal mechanism and before which federal or state authority can H-2B workers enforce their right to have mechanisms in place that prevent injury and disease and provide for indemnification in cases where the protections do not occur in Idaho, Colorado, Arkansas, Texas, Florida, Oregon, Tennessee and Wyoming? Through what legal procedure and before which court can H-2B workers enforce their right to have mechanisms in place that prevent injury and disease and provide for indemnification in cases where the protections do not occur in Idaho, Colorado, Arkansas, Texas, Florida, Oregon, Tennessee and Wyoming?**

Employees experiencing unsafe working conditions can file a complaint with the federal Occupational Safety and Health Administration. In some states there is also a state entity responsible for ensuring safe working conditions with which employees can file complaints. For example, in Oregon, employees experiencing unsafe working conditions can file a complaint with the Department of Consumer and Business Services.<sup>152</sup>

In some states, but not all states, employees experiencing problems with the workers' compensation system can file a complaint with the appropriate state entity. For example, in Oregon, employees can file complaints regarding the workers compensation system with the Office of the Ombudsman for Injured Workers.<sup>153</sup>

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<sup>152</sup> Or. Rev. Stat. § 652.062.

<sup>153</sup> Or. Rev. Stat. § 656.709(1).

**67(b). From 2003 to date, how many complaints have been filed by H-2B workers before the labor authority for violations of the prevention of injuries and occupational diseases and to provide indemnification in these cases? What court complaints have H-2B workers filed on this issue? How much time does it take the labor departments and the courts to resolve the presented complaints? If the complaints before the labor authorities have been resolved, what were the outcomes? Of all the resolved complaints, how many have been favorable to the worker?**

Petitioners do not know.

**68. How do the federal and/or state labor authorities make sure that H-2B workers have access to these court proceedings to enforce their rights regarding prevention and indemnification in cases of occupational injuries and diseases? How do the federal and state labor departments pursue these procedures? How do the federal and/or state labor departments ensure that H-2B workers know of the existence of these procedures to enforce their right to the prevention of occupational injuries and diseases?**

Petitioners do not know.

**69. What is the difference in treatment that occurs between workers who are citizens and H-2B workers regarding the prevention of occupational injuries and diseases? And with respect to accessing the courts to enforce their rights? If there is a difference, why does it exist?**

See responses to Questions 6 and 8.