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## The Department of Labor's Changing Policies Toward the H-2B Temporary Worker Program: Primarily for the Benefit of Nobody

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## THE DEPARTMENT OF LABOR'S CHANGING POLICIES TOWARD THE H-2B TEMPORARY WORKER PROGRAM: PRIMARILY FOR THE BENEFIT OF NOBODY

Charles C. Mathes\*

*The H-2B guestworker program enables U.S. employers to recruit and employ foreign workers on a temporary basis when domestic workers are unavailable. The program provides much needed assistance to small and seasonal businesses that are unable to recruit sufficient workers to meet their employment needs, while offering protections to domestic workers who have declined those employment opportunities. Though the benefits that the program provides to employers are obvious, the program also confers substantial advantages on the foreign workers who choose to participate.*

*H-2B employees typically come from impoverished countries with limited access to economic opportunity, and the H-2B program is often the only avenue these workers have to achieve gainful employment. Nevertheless, the Department of Labor (DOL) has concluded that these workers' pre-employment expenses—those which enable them to access the U.S. labor market, such as visa application fees and transportation costs—are primarily for the benefit of their U.S. employers and therefore must be reimbursed to meet the minimum wage under the Fair Labor Standards Act (FLSA). Though a number of district courts have agreed with the DOL's interpretation, the Fifth Circuit and at least one district court have concluded that H-2B employees' pre-employment expenses are not primarily for the benefit of their employer and thus need not be reimbursed.*

*The DOL responded to these decisions in 2012 by instituting a number of rule changes to the H-2B program designed to better protect H-2B workers. One such change requires H-2B employers to provide, pay for, or reimburse their employees' pre-employment costs. This Note argues that the DOL incorrectly interprets the FLSA as requiring reimbursement of these expenses. It contends that visa portability, not government-mandated benefits, is a more efficient approach to protecting H-2B employees. This Note ultimately concludes that both H-2B participants and U.S. workers would be better off if payment of these expenses was left to market forces.*

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## TABLE OF CONTENTS

INTRODUCTION.....	1803
I. A BACKGROUND AND HISTORY OF THE H-2B VISA .....	1806
A. <i>An Overview of the H-2B Visa</i> .....	1806
1. The History of the H-2 Guestworker Program.....	1806
2. Certification Procedures for H-2A and H-2B Employers	1808
a. <i>H-2A Certification Procedures</i> .....	1808
b. <i>H-2B Certification Procedures</i> .....	1809
3. Protections and Restrictions of H-2 Employees .....	1811
a. <i>Regulatory Protections: H-2A Versus H-2B</i> .....	1811
b. <i>Restrictions Common to H-2 Workers</i> .....	1812
4. The H-2B Program in Operation.....	1813
a. <i>Purposes of the H-2B Program</i> .....	1813
b. <i>Benefits of the H-2B Program</i> .....	1814
c. <i>Abuses Within the H-2B Program</i> .....	1816
d. <i>Current Trends of the H-2B Program</i> .....	1818
B. <i>The Fair Labor Standards Act</i> .....	1821
C. <i>The Department of Labor and the Administrative Scheme</i> .....	1823
D. <i>Arriaga and the Eleventh Circuit's Application</i>	
<i>of the FLSA to the H-2A Program</i> .....	1824
E. <i>The Department of Labor's Shift in Policy and Proposed</i>	
<i>Interpretation of the FLSA</i> .....	1827
1. The Department of Labor's 2008 Final Rule .....	1827
2. The Shift in the DOL's H-2B Policies .....	1829
II. CONFLICTING INTERPRETATIONS OF THE FLSA'S DEMANDS	
ON H-2B EMPLOYERS .....	1831
A. <i>Interpretations of the FLSA Not Requiring Reimbursement</i>	
<i>of the Employee's Pre-employment Expenses</i> .....	1831
1. The Fifth Circuit's Approach	
<i>in Castellanos-Contreras v. Decatur Hotels</i> .....	1831
2. The District Court of Nevada Endorses the	
Fifth Circuit's Interpretation of the FLSA .....	1833
B. <i>Interpretations of the FLSA Favoring Reimbursement</i>	
<i>of an H-2B Employee's Pre-employment Expenses</i> .....	1834
1. DOL Guidance .....	1834
a. <i>Field Assistance Bulletin 2009-2</i> .....	1834
b. <i>The 2012 Rule and the H-2B Visa's New</i>	
<i>Regulatory Scheme</i> .....	1836
2. Judicial Interpretation Finding that Reimbursement	
of an H-2B Employee's Pre-employment Expenses	
Is Required Under the FLSA.....	1837
a. <i>Castellanos-Contreras v. Decatur Hotels</i>	
<i>(Dissenting Opinion)</i> .....	1837
b. <i>District Court Cases</i> .....	1839

III. COMBINING THE FIFTH CIRCUIT’S INTERPRETATION OF THE FLSA WITH A FREE-MARKET APPROACH TO H-2B EMPLOYEE BENEFITS AND PROTECTIONS..... 1840

A. *The Legislative History of the H-2B Program Suggests that the 2012 Rule Improperly Imposes Unnecessary Obligations on H-2B Employers*..... 1841

1. Initial Division of the H-2 Program ..... 1841

2. FLSA Implications..... 1841

3. Administrative Law Implications..... 1842

B. *An H-2B Employee’s Pre-employment Expenses Are Not Primarily for the Benefit of the Employer* ..... 1843

1. These Expenses Are Not an Incident of and Necessary to the Employment..... 1843

2. An H-2B Employee’s Pre-employment Expenses Arise in the Course of Ordinary Life ..... 1845

3. Relative Benefit Analysis ..... 1847

C. *Policy Reasons Favoring the Fifth Circuit’s Interpretation of the FLSA*..... 1848

1. Effects on Domestic Employment ..... 1848

2. Visa Portability Is the Appropriate Means to Prevent Exploitation of H-2B Employees..... 1849

CONCLUSION..... 1850

INTRODUCTION

The H-2B guestworker program enables U.S. employers to hire foreign workers to fill non-agricultural occupations on a temporary basis.<sup>1</sup> Consequently, the program intersects two of the most divisive issues facing the United States today: immigration reform and rising unemployment. Though some critics assert that the program displaces domestic workers and is fraught with abuse,<sup>2</sup> its statutory framework is specifically designed to protect the jobs of U.S. citizens and to supply an adequate labor force to U.S. employers.<sup>3</sup>

Though the benefits of the H-2B program to employers are obvious, the advantages the program offers to employees cannot be understated. Consider the case of Juan Romo del Alto, now thirty-four, who first participated in the H-2B program in 2002.<sup>4</sup> That year, Mr. Romo del Alto secured employment through the H-2B program at a New Orleans

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1. 8 U.S.C. § 1101(a)(15)(H)(ii)(b) (2006).

2. See Mary Bauer, *Close to Slavery: Guestworker Programs in the United States*, S. POVERTY L. CTR. 1 (2007), [http://www.splcenter.org/sites/default/files/legacy/pdf/static/Close\\_to\\_Slavery.pdf](http://www.splcenter.org/sites/default/files/legacy/pdf/static/Close_to_Slavery.pdf).

3. See *Rogers v. Larson*, 563 F.2d 617, 626 (3d Cir. 1977) (examining the objectives of the H-2 program’s statutory scheme).

4. See Madeline Zavodny & Tamar Jacoby, *The Economic Impact of H-2B Workers* 16 (2010), [http://www.uschamber.com/sites/default/files/reports/16102\\_LABR%20H2BReport\\_LR.pdf](http://www.uschamber.com/sites/default/files/reports/16102_LABR%20H2BReport_LR.pdf).

landscaping company.<sup>5</sup> He returned to Mexico at the end of his contract period, and was offered a similar position at a New Jersey landscaper the following summer.<sup>6</sup> He still returns home every fall, but he has worked for the same New Jersey employer every summer since.<sup>7</sup> According to Mr. Romo del Alto, the most he could earn in Mexico is \$30 per day.<sup>8</sup> Participating in the H-2B program, however, he makes \$17.75 per hour.<sup>9</sup> The program has enabled him to purchase a house in Mexico and better provide for his wife and two children.<sup>10</sup>

To be sure, not every H-2B employee experiences the same success as Mr. Romo del Alto, and there have been documented instances of fraud and abuse within the program.<sup>11</sup> Nevertheless, his story is far from unique. Numerous foreign families have come to rely on the income earned in the H-2B program to cover the costs of daily living, including basic amenities such as indoor plumbing, personal telephones, and medical expenses.<sup>12</sup> Because of the lack of economic opportunity in migrant-sending communities, the H-2B program is often the only option many participants have to earn a viable income.<sup>13</sup>

Notwithstanding the clear benefits that the H-2B program provides to its participants, there is evidence that the regulations governing the program fail to adequately protect foreign workers.<sup>14</sup> This lack of protection has left some H-2B workers vulnerable to abuse and exploitation.<sup>15</sup> Some commentators, such as New York Congressman Charles Rangel, have gone so far as to liken the program to slavery, while others have referred to it as a “modern-day system of indentured servitude.”<sup>16</sup>

In order to gain entry into the United States, an H-2B worker must necessarily incur certain pre-employment expenses related to her recruitment, visa application, and transportation.<sup>17</sup> Courts have reached opposite conclusions as to whether these costs are “primarily for the benefit

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5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-1053, H-2B VISA PROGRAM: CLOSED CIVIL AND CRIMINAL CASES ILLUSTRATE INSTANCES OF H-2B WORKERS BEING TARGETS OF FRAUD AND ABUSE (2010) (offering examples of H-2B employers paying employees unfair wages, charging them excessive fees, and subjecting them to deplorable working conditions).

12. See, e.g., INT'L HUMAN RIGHTS LAW CLINIC, AM. UNIV. WASH. COLL. OF LAW & CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., PICKED APART: THE HIDDEN STRUGGLES OF MIGRANT WORKER WOMEN IN THE MARYLAND CRAB INDUSTRY 11–12 (2010), [http://www.wcl.american.edu/clinical/documents/20100714\\_auwcl\\_ihrlic\\_picked\\_apart.pdf?rd=1](http://www.wcl.american.edu/clinical/documents/20100714_auwcl_ihrlic_picked_apart.pdf?rd=1) (describing Mexican reliance on the H-2B program).

13. *Id.*

14. See Bauer, *supra* note 2, at 1, 42.

15. *Id.* at 2.

16. *Id.* at 2.

17. See, e.g., *Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393, 400–04 (5th Cir. 2010) (en banc) (discussing whether the Fair Labor Standards Act requires reimbursement for such expenses).

and convenience of the employer”<sup>18</sup> and therefore must be reimbursed under the Fair Labor Standards Act<sup>19</sup> (FLSA). In fact, over the past decade the Department of Labor (DOL) itself has applied conflicting interpretations to the FLSA’s demands of H-2B employers.<sup>20</sup> Nevertheless, the current DOL, in an effort to ameliorate the “adverse impacts [that a policy of non-reimbursement] might have on our Nation’s most vulnerable workers,”<sup>21</sup> has amended the H-2B regulatory scheme to explicitly require H-2B employers to reimburse these expenses.<sup>22</sup>

The program’s critics assert that failing to require reimbursement of H-2B employees’ pre-employment expenses has contributed to a systematic pattern of abuse within the program, and therefore the DOL’s new regulations are a step in the right direction.<sup>23</sup> On the other hand, H-2B employers argue that the new rules are “extremely costly and [will] impose a deadweight cost on U.S. employers, thereby reducing their ability to employ domestic workers.”<sup>24</sup> Consequently, this shift in policy may have far-reaching effects beyond the program’s participants, and may actually contradict the program’s primary objectives.

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18. See 29 C.F.R. § 531.3(d)(1) (2011).

19. See *Catellanos-Contreras*, 622 F.3d at 403–04 (concluding that H-2B employers are not required to reimburse these expenses under the FLSA). *But see* *Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228, 1243–46 (11th Cir. 2002) (holding that in the context of the H-2A temporary worker program, visa and transportation expenses were primarily for the benefit of the employer, and therefore required reimbursement, but recruitment expenses did not).

20. See Labor Certification Process for H-2B Workers, 73 Fed. Reg. 78,020, 78,039–42 (Dec. 19, 2008) (withdrawn by 74 Fed. Reg. 13,261 (Mar. 26, 2009)) (“The Department will continue to permit employers, consistent with the Fair Labor Standards Act (FLSA), to make deductions from a worker’s pay for the reasonable cost of furnishing housing and transportation, as well as worker expenses such as passport and visa fees . . . . [T]he Department believes that the costs of relocation to the site of the job opportunity . . . is not primarily for the benefit of the H-2B employer.”). *But see* Temporary Non-agricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. 10,038, 10,077 (Feb 21, 2011) (to be codified at 20 C.F.R. pt. 655) (noting that an H-2B worker’s visa fees and transportation costs primarily benefit his employer and therefore “employers covered by the FLSA must pay such expenses to nonexempt employees in the first workweek, to the extent necessary to meet the FLSA minimum wage (outside the Fifth Circuit)”).

21. Withdrawal of Interpretation of the Fair Labor Standards Act Concerning Relocation Expenses Incurred by H-2A and H-2B Workers, 74 Fed. Reg. 13,261, 13,262 (Mar. 26, 2009).

22. Temporary Non-agricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. at 10,076–78; see also U.S. DEP’T OF LABOR, WAGE & HOUR DIV., EMP’T STANDARDS ADMIN., TRAVEL AND VISA EXPENSES OF H-2B WORKERS UNDER THE FLSA 12 (2009) [hereinafter FAB 2009-2], available at [http://www.dol.gov/whd/FieldBulletins/FieldAssistanceBulletin2009\\_2.pdf](http://www.dol.gov/whd/FieldBulletins/FieldAssistanceBulletin2009_2.pdf) (interpreting the FLSA to require reimbursement of such expenses because “in the context of the H-2B temporary nonimmigrant visa program . . . such travel and visa costs are for the primary benefit of the employer”).

23. See Bauer, *supra* note 2, at 30, 42 (“Employers should be required to bear all the costs of recruiting and transporting guestworkers to this country. . . . Requiring guestworkers to pay these fees encourages the over-recruitment of guestworkers and puts them in a position of debt peonage that leads to abuse.”).

24. See Letter from MASLabor H-2B, LLC et al. to Michael Jones, Acting Adm’r, Office of Policy Dev. and Research, Emp’t and Training Admin., U.S. Dep’t of Labor (May 17, 2011), available at [http://www.anla.org/docs/Government%20Relations/05%2017%202011%20H2B%20Comments%20Final%20\(2\).pdf](http://www.anla.org/docs/Government%20Relations/05%2017%202011%20H2B%20Comments%20Final%20(2).pdf).

This Note argues that the DOL's approach incorrectly concludes that these expenses are primarily for the benefit of the employer, unnecessarily imposes increased labor costs on H-2B employers already suffering from a stagnant economy, and fails to properly protect H-2B employees. The H-2B program appears in need of reform, but the changes advanced by the DOL are off target and potentially disastrous for H-2B participants.<sup>25</sup> This Note concludes that a more effective policy to curb employee abuse, while also limiting the cost of employer participation, would be to require more transparency in the recruitment process and to provide for visa portability in the event of labor violations. Though purporting to protect "our Nation's most vulnerable workers,"<sup>26</sup> the DOL's shift in policy will put unnecessary burdens on seasonal businesses and will place domestic and H-2B employees at risk of losing their jobs.<sup>27</sup>

Part I of this Note provides a brief overview of both the H-2 temporary guestworker program and the FLSA—including their history, purposes, and interaction. Part II analyzes the conflicting interpretations of the FLSA's reimbursement requirements for H-2B employers. Finally, Part III argues that the DOL is incorrectly interpreting these requirements, and offers an alternative solution to the problem of potential employee abuse.

## I. A BACKGROUND AND HISTORY OF THE H-2B VISA

Part I.A provides a general overview of the H-2B program, noting in particular the history of the visa and the disparate treatment of H-2A and H-2B workers. Parts I.B and I.C explore the FLSA and the DOL's role in administering the Act. Part I.D examines the Eleventh Circuit's application of the FLSA to the H-2A program, and its conclusion that the FLSA requires reimbursement of an H-2A employee's transportation and visa expenses in certain circumstances. Lastly, Part I.E analyzes the DOL's recent shift in policy concerning H-2B employers' reimbursement of these expenses.

### A. *An Overview of the H-2B Visa*

#### 1. The History of the H-2 Guestworker Program

Dating as far back as 1917, the United States has relied on temporary guestworkers from foreign countries to supplement the domestic labor

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25. *The H-2B Guestworker Program and Improving the Department of Labor's Enforcement of the Rights of Guestworkers: Hearing Before the Subcomm. on Domestic Policy of the Comm. on Oversight & Gov't Reform*, 111th Cong. 370–72 (2009) [hereinafter *2009 Hearings*] (statement of Patrick A. McLaughlin, Professor, George Mason Univ.) (asserting that government-mandated benefits for H-2B workers, such as inbound transportation costs, result in lower pay and reduced employment for both H-2B and U.S. workers).

26. *Withdrawal of Interpretation of the Fair Labor Standards Act Concerning Relocation Expenses Incurred by H-2A and H-2B Workers*, 74 Fed. Reg. at 13,262.

27. *See 2009 Hearings*, *supra* note 25, at 367 (noting that government-mandated benefits for H-2B workers might encourage H-2B employers to hire fewer H-2B workers or resort to illegal immigrant labor).

market.<sup>28</sup> Though early guestworker programs centered primarily on agricultural employment,<sup>29</sup> by 1952, Congress recognized a need for temporary guestworkers in other industries, and established the H-2 temporary work visa as part of the Immigration and Nationality Act<sup>30</sup> (INA). An employer's participation in the H-2 program required certification by the Secretary of Labor that no qualified U.S. workers were available and that the foreign workers' employment would not adversely affect the wages and working conditions of domestic employees.<sup>31</sup>

In 1986, responding to calls for increased protection of temporary agricultural workers,<sup>32</sup> Congress made significant changes to the H-2 program in the Immigration Reform and Control Act<sup>33</sup> (IRCA). Specifically, IRCA divided the H-2 visa into two separate categories: the H-2A visa for temporary agricultural workers and the H-2B visa for temporary non-agricultural workers.<sup>34</sup> In doing so, Congress noted that the essential objective of the H-2 program was to remain the same—to permit employers to utilize temporary foreign workers if U.S. workers could not be found and if the use of such workers would not adversely affect the wages or working conditions of similarly employed domestic workers.<sup>35</sup>

One of the primary purposes of dividing the H-2 program was to modify the agricultural H-2 procedures and thereby improve labor conditions for H-2A employees.<sup>36</sup> Congress had determined that the regulations governing agricultural workers “[did] not fully meet the need for an efficient, workable and coherent program that protects the interests of agricultural employers and workers alike.”<sup>37</sup> Regarding non-agricultural

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28. See Immigration Act of 1917, Pub. L. No. 64-301, ch. 29, 39 Stat. 874 (codified as amended at 8 U.S.C. § 1181 (2006)) (allowing the Commissioner of General Immigration to admit agricultural laborers for temporary employment during World War I); see also Marsha Chien, Note, *When Two Laws Are Better than One: Protecting the Rights of Migrant Workers*, 28 BERKELEY J. INT'L L. 15, 18 (2010) (“The first Mexican guest worker program was established in 1917 in response to the Immigration Act of 1917.”).

29. See Alice J. Baker, *Agricultural Guestworker Programs in the United States*, 10 TEX. HISP. J.L. & POL'Y 79, 82–88 (2004) (describing the early implementation of the Immigration and Nationality Act, and the evolution of guestworker programs within the United States).

30. See Pub. L. No. 82-414, § 101(a)(15)(H)(ii), 66 Stat. 163, 168 (1952) (codified as amended at 8 U.S.C. § 1101(a)(15)(H)(ii) (2006)).

31. Baker, *supra* note 29, at 85–87 (describing the history of the H-2 program).

32. See *Martinez v. Reich*, 934 F. Supp. 232, 237 (S.D. Tex. 1996) (observing that the “DOL . . . issued separate procedures for agricultural workers because of its experience with employer abuse of migrant and seasonal agricultural workers,” and that the congressional history “specifically noted that no changes were made to the statutory language concerning non-agricultural workers.”); see also Arthur N. Read, *Learning from the Past: Designing Effective Worker Protections for Comprehensive Immigration Reform*, 16 TEMP. POL. & CIV. RTS. L. REV. 423, 430 (2007) (noting that the DOL separated the H-2A and H-2B programs due to the “considerable advocacy to protect rights of temporary agricultural workers”).

33. Pub. L. No. 99-603, § 301(a), 100 Stat. 3359, 3411 (codified at 8 U.S.C. § 1101(a)(15)(H)(ii)(a)–(b)).

34. *Id.*

35. H.R. REP. NO. 99-682, pt. 1, at 50–51 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5654–55.

36. *Id.* at 51, 1986 U.S.C.C.A.N. at 5655.

37. *Id.* at 80, 1986 U.S.C.C.A.N. at 5684.

workers, however, a House Report accompanying the bill specifically noted that no changes were being made to the statutory language governing non-agricultural H-2s since the program had worked “reasonably well” with respect to non-agricultural occupations.<sup>38</sup>

More than twenty years later, in 2008, the House Subcommittee on Immigration considered the whether the statutory scheme governing the H-2B program adequately protected H-2B workers,<sup>39</sup> but ultimately declined to take any action.<sup>40</sup> And as recently as 2009, Representative Zoe Lofgren introduced legislation to reform the H-2B program to include protections similar to those provided to agricultural workers.<sup>41</sup> This proposed legislation, however, never reached the floor of the House of Representatives for substantive consideration.<sup>42</sup>

## 2. Certification Procedures for H-2A and H-2B Employers

### a. H-2A Certification Procedures

An H-2A worker is an alien with a residence in a foreign country who comes to the United States on a temporary basis to perform agricultural labor when unemployed domestic workers cannot be found.<sup>43</sup> Unlike the H-2B program, which is capped at 66,000 workers per fiscal year,<sup>44</sup> there is no cap on H-2A visas.<sup>45</sup> Since 2002, the number of H-2A visas issued by

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38. *Id.* at 50–51, 1986 U.S.C.C.A.N. at 5654–55. The record was very specific that “[t]he bill makes no changes to the statutory language concerning non-agricultural H-2’s; instead it divides the program into two parts and sets forth a number of specific requirements regarding the operation of the H-2A program.” *Id.* at 80, 1986 U.S.C.C.A.N. at 5684. One scholar has asserted that increased protection for H-2A workers resulted from “considerable advocacy to protect rights of temporary agricultural workers,” while “the existing H-2B non-agricultural temporary worker program was virtually ignored in the legislative debate.” Read, *supra* note 32, at 430, 432.

39. *H-2B Program: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., and Int’l Law of the Comm. on the Judiciary*, 110th Cong. 28, 40–52 (2008).

40. See Michael Prasad, Note, *We Need Your Help! But It’s Gonna Cost You: Arriaga, Castellanos-Contreras, and Why Point of Hire Fees Should Be Paid by the Employer*, 33 W. NEW ENG. L. REV. 817, 849 (2011) (noting that, as of 2011, “Congress has been silent on the issue of point of hire fees [and] the courts and the DOL have been left to offer varying interpretations”).

41. See H-2B Program Reform Act of 2009, H.R. 4381(o)(11), 111th Cong. (2009) (requiring the H-2B employer to cover its employees’ transportation costs).

42. See Status of H.R. 4381, <http://www.govtrack.us/congress/bill.xpd?bill=h111-4381> (last visited Feb. 23, 2012).

43. 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (2006). Employment is of a seasonal nature “where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations.” 20 C.F.R. § 655.103(d) (2011). Employment is temporary “where the employer’s need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.” *Id.*

44. 8 U.S.C. § 1184(g)(1)(B).

45. Kati L. Griffith, *U.S. Migrant Worker Law: The Interstices of Immigration Law and Labor and Employment Law*, 31 COMP. LAB. L. & POL’Y J. 125, 135 n.77 (2009).

the DOL has fluctuated from a low of 29,882 in 2003,<sup>46</sup> to a high of 64,404 in 2008.<sup>47</sup> Most recently, in 2010, the DOL issued 55,921 H-2A visas.<sup>48</sup>

To participate in the H-2A program, the agricultural employer must first obtain certification from the DOL.<sup>49</sup> Consistent with the aims of the H-2 program, the certification process is meant to preserve jobs, wages, and working conditions for U.S. workers.<sup>50</sup> To this end, the Secretary of Labor must certify that there are not sufficient domestic workers willing to do the work in the petition, and that the employment of the foreign worker will not adversely impact the wages and working conditions of American employees.<sup>51</sup> If the employer's petition satisfies these requirements and none of the conditions for denial of labor certification are present, the Secretary of Labor will approve the application.<sup>52</sup>

#### *b. H-2B Certification Procedures*

An H-2B worker is an alien with a residence in a foreign country who comes to the United States temporarily to perform non-agricultural labor.<sup>53</sup> The H-2B application process is similar to the application process for H-2A visas described above.<sup>54</sup> The employer must first file a prevailing wage request with the DOL, and offer the position at a wage that meets the DOL's prevailing wage determination (PWD).<sup>55</sup> Under the 2012 final rule amending the H-2B regulatory scheme (2012 Rule), the employer must also file its application and a copy of its job order with the Office of Foreign

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46. See *Classes of Nonimmigrants Issued Visas Fiscal Years 2002-2006*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, <http://www.travel.state.gov/pdf/NIVClassIssued-DetailedFY2002-2006.pdf> [hereinafter *Nonimmigrant Visas 2002-2006*].

47. See *Classes of Nonimmigrants Issued Visas Fiscal Years 2006-2010*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, <http://www.travel.state.gov/pdf/NIVClassIssued-DetailedFY2006-2010.pdf> [hereinafter *Nonimmigrant Visas 2006-2010*].

48. *Id.*

49. See Bryce W. Ashby, *Indentured Guests—How the H-2A and H-2B Temporary Guest Worker Programs Create the Conditions for Indentured Servitude and Why Upfront Reimbursement for Guest Workers' Transportation, Visa, and Recruitment Costs Is the Solution*, 38 U. MEM. L. REV. 893, 901 (2008).

50. Baker, *supra* note 29, at 88.

51. 8 U.S.C. § 1188(a)(1)(A)–(B) (2006).

52. See *id.* § 1188(b)(1)–(4). The Secretary of Labor may deny certification if: a strike or lockout occurs; the employer has materially violated the H-2A certification process at any time in the past two years; the employer does not provide adequate assurances that she will provide insurance to cover job-related injuries to the employee; or if the employer has not made positive recruitment efforts to employ U.S. workers. *Id.*

53. *Id.* § 1101(a)(15)(H)(ii)(b).

54. See *supra* notes 49–52 and accompanying text. An employer seeking to participate in the H-2B program must first obtain certification from the DOL. 8 C.F.R. § 214.2(h)(6)(iii)(A) (2011). To obtain certification, the employer must demonstrate that there are an insufficient number of willing and able U.S. workers available for the job opportunity, and that the employment of the H-2B worker will not adversely impact the wages or working conditions of similarly employed domestic workers. 20 C.F.R. § 655.32(b) (2011).

55. See 20 C.F.R. § 655.10. The DOL has promulgated new regulations altering the methodology used to calculate the PWD, which have been the subject of much controversy. See *infra* note 270 and accompanying text (discussing the proposed change to the PWD calculation and its subsequent postponement).

Labor Certification (OFLC).<sup>56</sup> Among other things, the job order must offer the same benefits to U.S. workers as are provided to H-2B workers, must specify the worker's wages and any deductions the employer intends to make from the worker's paycheck, and must guarantee employment for three-fourths of the contract period.<sup>57</sup> Furthermore, the employer must establish that its need for H-2B workers is temporary.<sup>58</sup> An employer's need is considered temporary if it qualifies as a one-time occurrence, a seasonal need, a peakload need, or an intermittent need, as defined by the Department of Homeland Security (DHS).<sup>59</sup>

Under the 2012 Rule, the employer's domestic recruitment obligations have been modified to provide greater protection to U.S. workers.<sup>60</sup> Whereas previously the employer merely attested that it had complied with the DOL's regulatory requirements, the employer must now actually demonstrate that it has adequately surveyed the U.S. labor market.<sup>61</sup> Specifically, the rule requires the OFLC, upon acceptance of the employer's application, to place a copy of the job order in an electronic job registry, thereby improving the visibility of the H-2B job to U.S. workers.<sup>62</sup> The employer must also engage in its own independent recruitment efforts to ensure that there are no qualified U.S. workers available for the offered position.<sup>63</sup> To this end, the employer must contact its former U.S. employees,<sup>64</sup> comply with certain advertising requirements,<sup>65</sup> and contact the applicable union if a collective bargaining agreement covers the occupation.<sup>66</sup> If the employer meets all of its regulatory requirements, and the OFLC is satisfied that there is an insufficient number of U.S. workers qualified for the H-2B position, the DOL will certify the employer.<sup>67</sup>

If an employer is successful in obtaining certification from the DOL, it must then petition U.S. Citizenship and Immigration Services (USCIS), a federal agency within the DHS, to grant the visa application.<sup>68</sup> The USCIS may not issue more than 66,000 H-2B visas per fiscal year, allocated equally between each half-year.<sup>69</sup>

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56. Temporary Non-agricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. 10,038, 10,153 (Feb. 21, 2012) (to be codified at 20 C.F.R. § 655.15(a)).

57. *Id.* at 10,155 (to be codified at 20 C.F.R. § 655.18).

58. 20 C.F.R. § 655.6.

59. *Id.* For definitions of "one-time occurrence," "seasonal need," "peakload need," and "intermittent need," see 8 C.F.R. 214.2(h)(6)(ii)(B)(1)-(4) (2011).

60. Temporary Non-agricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. at 10,129.

61. *Id.*

62. *Id.* at 10,161 (to be codified at 20 C.F.R. § 655.34).

63. *Id.* at 10,162 (to be codified at 20 C.F.R. § 655.40).

64. *Id.* at 10,163 (to be codified at 20 C.F.R. § 655.43).

65. *Id.* at 10,162 (to be codified at 20 C.F.R. § 655.41-42).

66. *Id.* at 10,163 (to be codified at 20 C.F.R. § 655.45).

67. *Id.* at 10,164 (to be codified at 20 C.F.R. § 655.51).

68. 20 C.F.R. § 655.5(b) (2011); see also Lindsay M. Pickral, *Close to Crucial: The H-2B Visa Program Must Evolve, but Must Endure*, 42 U. RICH. L. REV. 1011, 1018 (2008) (describing the H-2B application process).

69. 8 U.S.C. § 1184(g)(1)(B) (2006).

### 3. Protections and Restrictions of H-2 Employees

#### *a. Regulatory Protections: H-2A Versus H-2B*

One of Congress's objectives in dividing the H-2 program into the H-2A and H-2B visa programs was to protect migrant farm workers.<sup>70</sup> Accordingly, the regulations governing the H-2A visa have historically contained a number of requirements designed to prevent the exploitation of H-2A workers that were not present in the H-2B regulations.<sup>71</sup> For instance, the H-2A regulations specify that the agricultural job offer must include free housing,<sup>72</sup> meals or cooking facilities,<sup>73</sup> guaranteed employment for at least three-fourths of the contract period,<sup>74</sup> and reimbursement for the employee's transportation costs.<sup>75</sup> Prior to the 2012 Rule and consistent with the legislative history leading to the division of the H-2 program,<sup>76</sup> the regulations governing H-2B workers contained no such requirements.<sup>77</sup>

With respect to an employee's transportation expenses, if an agricultural worker completes 50 percent of the work contract period, the H-2A regulations require the employer to reimburse the employee for reasonable costs incurred in traveling to the worksite from her home abroad.<sup>78</sup> The H-2A employer must also provide transportation between the employee's living quarters and the worksite, as well as return transportation if the worker completes the contract period or is terminated without cause.<sup>79</sup> Conversely, prior to the 2012 Rule, the only transportation requirement imposed on H-2B employers was to provide return transportation if the employee was dismissed prior to the end of the contract period.<sup>80</sup> Congress recently considered a bill that would have required H-2B employers to

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70. *See supra* notes 35–39 and accompanying text.

71. Baker, *supra* note 29, at 88–90.

72. 20 C.F.R. § 655.122(d)(1). Congressman Lamar Smith has proposed legislation that would replace the H-2A program with a new program called the H-2C. *See* H.R. 2847, 112th Cong. (2011). The bill's major provisions would allow 500,000 visas per year, replace the DOL with the Department of Agriculture as the program's governing body, and ease wage, housing, and transportation requirements. *Id.*

73. 20 C.F.R. § 655.122(g).

74. *Id.* § 655.122(i).

75. *Id.* § 655.122(h).

76. *See* H.R. Rep. No. 99-682(I), at 50–51 (1986) *reprinted in* 1986 U.S.C.C.A.N. 5649, 5654–55 (“Overall, the program has worked reasonably well with respect to non-agricultural occupations. . . . The bill makes no changes regarding the non-agricultural H-2 law.”).

77. *See* Ashby, *supra* note 49, at 904 n.61. *But see* Temporary Non-agricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. 10,038, 10,066–67 (Feb. 21, 2012) (to be codified at 20 C.F.R. § 655.18) (extending the three-fourths guarantee and transportation reimbursement requirements to the H-2B program).

78. 20 C.F.R. § 655.122(h).

79. *Id.*

80. *See* 20 C.F.R. § 655.22(m); *see also* Ashby, *supra* note 49, at 904 (“[T]he most significant difference . . . is that the H-2B program contains no travel reimbursement requirement from guest workers' homes to their places of employment.”).

cover the transportation and subsistence costs of their employees, but ultimately declined to adopt it.<sup>81</sup>

Foreign workers seeking to participate in both the H-2A and H-2B programs typically contact local recruitment agencies to navigate the complicated recruitment process.<sup>82</sup> In an effort to protect H-2 workers from unscrupulous recruiters,<sup>83</sup> the regulations governing both the H-2A and H-2B programs require the employer to contractually forbid any foreign labor contractor from receiving payments from prospective employees.<sup>84</sup> Furthermore, an H-2 employer must attest in its application that neither the employer nor its agents received any payment from the employee for its recruitment costs, application fees, or certification expenses.<sup>85</sup> Nevertheless, the regulations governing both programs specifically disclaim any prohibition on an employer receiving reimbursement for passport and visa fees, and further classify these expenses as “the responsibility of the worker.”<sup>86</sup>

Both H-2A and H-2B workers are protected by the FLSA.<sup>87</sup> Regulations governing the H-2B program demand that the employer specify in its job offer all deductions not required by law, and prohibit the employer from making any deductions that would violate the FLSA.<sup>88</sup> Despite the historic absence of regulations expressly requiring repayment of an H-2B employee’s pre-employment expenses, some courts have interpreted this FLSA requirement to demand such reimbursement.<sup>89</sup> This Note analyzes the legal conflict stemming from this divergence in interpretation, as well as the integrity of the DOL’s recent shift in policy.

#### *b. Restrictions Common to H-2 Workers*

Once they arrive in the United States, the freedom of H-2 visa holders is substantially limited. Notably, both H-2A and H-2B visa holders lack “visa portability,”<sup>90</sup> which is to say that they are unable to seek permanent

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81. See H-2B Program Reform Act of 2009, H.R. 4381, 111th Cong. (2009).

82. See Elizabeth Johnston, Note, *The United States Guestworker Program: The Need for Reform*, 43 VAND. J. TRANSNAT’L L. 1121, 1132 (2010).

83. See *id.*

84. 20 C.F.R. § 655.1305(p) (governing H-2A workers); *id.* § 655.22(g)(2) (governing H-2B workers).

85. *Id.* § 655.1305(o) (H-2A); *id.* § 655.22(j) (H-2B).

86. *Id.* § 655.1305(o) (H-2A); *id.* § 655.22(g)(2) (H-2B).

87. See *Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393, 397 (5th Cir. 2010) (en banc) (“The parties and the en banc court agree that the FLSA applies to the [H-2B workers] in the situation before the court.”); *Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228, 1235 (11th Cir. 2002) (applying the FLSA to H-2A workers).

88. 20 C.F.R. § 655.22(g)(1).

89. See *Gaxiola v. Williams Seafood of Arapahoe*, 776 F. Supp. 2d 117, 126–27 (E.D.N.C. 2011) (holding that transportation and visa costs cannot be subject to a deduction, either actual or de facto, that reduces a worker’s wage below the federal minimum); *Teoba v. Trugreen Landcare LLC*, 769 F. Supp. 2d 175, 185–86 (W.D.N.Y. 2011) (holding that H-2B employers may not pass on an H-2B employee’s visa, recruitment, or transportation costs to the employee if doing so would reduce the employee’s wages below minimum wage).

90. See 8 C.F.R. § 214.2(h)(2)(i)(D) (2011) (noting that if an employee wants to change employers, the new employer must file a new petition and it must be approved).

residency in the United States and are restricted in their ability to switch employers during the term of their visa.<sup>91</sup> This increases the inequality in bargaining power between the employer and employee because H-2 workers often fear being blacklisted if they attempt to assert their rights.<sup>92</sup> It follows, therefore, that once an H-2B employee arrives in the United States, she would also be reluctant to report abuse by her employer and risk being forced to return to her home country.<sup>93</sup> Some have argued that this problem is exacerbated when employers are not required to reimburse an employee's pre-employment expenses, as employees are often unwilling to jeopardize their recovery of these initial expenditures.<sup>94</sup> In 2005, Senators John McCain and Edward Kennedy introduced legislation that included the right for temporary guestworkers to change employers without penalty.<sup>95</sup> However, Congress never voted on this bill.<sup>96</sup>

#### 4. The H-2B Program in Operation

##### *a. Purposes of the H-2B Program*

The two primary purposes of the H-2B visa program are to assure an adequate supply of labor for U.S. employers and to protect the jobs of American employees.<sup>97</sup> Congress evaluated the program in 2006 as the Senate extended an exemption from the 66,000-visa cap for returning H-2B workers.<sup>98</sup> A number of senators from both parties recognized that a primary feature of the program has been the protection of U.S. jobs.<sup>99</sup> For example, Senator Barbara Mikulski noted that the program is necessary to keep many small and seasonal businesses afloat, and praised the program for enabling its participants to employ more domestic workers.<sup>100</sup> In an earlier debate, Senator James Jeffords acknowledged the benefits of the program to Vermont's economy, and noted that inhibiting the ability of employers to secure seasonal workers would have a detrimental effect on the employment of American employees.<sup>101</sup> Similarly, Senator Susan Collins proclaimed that impeding an employer's access to the visa program

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91. See Griffith, *supra* note 45, at 135.

92. *Id.* at 137–38.

93. *Id.* at 138.

94. *Id.*

95. See Secure America and Orderly Immigration Act, S. 1033, 109th Cong. § 302(e) (2005) (amending the Immigration and Nationality Act to include a provision for visa portability).

96. See Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1561 n.17 (2008).

97. See *Rogers v. Larson*, 563 F.2d 617, 626 (3d Cir. 1977) (examining the statutory scheme of the H-2 visa program).

98. See 152 CONG. REC. 4692, 4702–03 (2006); see also *infra* notes 154–58 and accompanying text (discussing the returning H-2B worker exemption).

99. See 152 CONG. REC. 4702–03.

100. *Id.* at 4703 (statement of Sen. Mikulski) (“By employing 65 H-2B workers, [one particular Maryland business] can retain 30 full-time American workers all year long.”).

101. 151 CONG. REC. 6518, 6548 (2005) (statement of Sen. Jeffords) (“Many [Vermont employers] foresee a devastating effect on their businesses if they are not able to bring in foreign workers soon.”).

“would translate into lost jobs for American workers, lost income for American businesses, and lost tax revenues for our States.”<sup>102</sup>

*b. Benefits of the H-2B Program*

A report by the United States Chamber of Commerce<sup>103</sup> (USCOC) argues that the H-2B program provides a number of economic benefits to its participants and to society as a whole, thus supporting the assertions of Senators Mikulski, Jeffords, and Collins.<sup>104</sup> For employers, the H-2B program inherently supplies a source of supplementary labor for jobs that U.S. workers are unwilling to take.<sup>105</sup> U.S. workers typically decline these jobs because they are often physically demanding and are frequently located in remote parts of the country.<sup>106</sup> As comedian Stephen Colbert quipped while testifying before Congress,<sup>107</sup> “Normally, I would leave this to the invisible hand of the market. But the invisible hand of the market has already moved over 84,000 acres of production and over 22,000 farm jobs to Mexico . . . . [B]ecause, apparently, even the invisible hand doesn’t want to pick beans.”<sup>108</sup>

The USCOC asserts that the program also reduces employers’ training and turnover costs.<sup>109</sup> Unlike their domestic counterparts who often resign before the end of their contract period, most H-2B workers stay for the duration of the work season.<sup>110</sup> The foreign workers’ greater reliability provides a steady and dependable workforce for H-2B employers and limits the disruptions associated with mid-season employee departures.<sup>111</sup> Furthermore, H-2B employees often return to their positions year after year thereby limiting the cost of training new employees.<sup>112</sup>

102. 151 CONG. REC. 6254, 6289 (statement of Sen. Collins).

103. The Chamber of Commerce is a federation of over 3 million businesses whose core purpose is to advocate for free enterprise. *See About the U.S. Chamber of Commerce*, U.S. CHAMBER OF COMMERCE, <http://www.uschamber.com/about> (last visited Feb. 23, 2012).

104. *See* Zavodny & Jacoby, *supra* note 4, at 10–12.

105. *See id.* at 10, 14 (noting that employers resort to the H-2B program when they cannot find enough U.S. workers to meet customer demand, and citing the temporary nature and physical demands of the jobs offered); *see also* Kirk Johnson, *Hiring Locally for Farm Work Is No Cure-All*, N.Y. TIMES, Oct. 5, 2011, at A17 (describing an instance of Americans taking H-2 jobs but quitting within six hours because the work was too hard).

106. *See* Zavodny & Jacoby, *supra* note 4, at 10, 14.

107. In 2010, Colbert participated in the United Farm Workers “Take Our Jobs” campaign challenging U.S. citizens to replace immigrant farm laborers. *See UFW’s National ‘Take Our Jobs’ Campaign Invites U.S. Citizens to Replace Immigrant Farm Workers*, UNITED FARM WORKERS (Jun. 24, 2010), [http://www.ufw.org/\\_board.php?mode=view&b\\_code=news\\_press&b\\_no=7195&page=6&field=&key=&n=661](http://www.ufw.org/_board.php?mode=view&b_code=news_press&b_no=7195&page=6&field=&key=&n=661).

108. *Protecting America’s Harvest: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., and Int’l Law of the Comm. on the Judiciary*, 111th Cong. 33 (2010) (statement of Stephen Colbert).

109. *See* Zavodny & Jacoby, *supra* note 4, at 11.

110. *See id.* at 11. According to one H-2B employer, “A local candidate will accept a seasonal [H-2B] job only until he/she finds a full-time year-round position.” *Id.* at 15.

111. *Id.* at 11.

112. *Id.*

Moreover, the USCOC report emphasizes the substantial benefits the program confers to employees. Because employers wish to limit their training and recruitment expenses, H-2B employees can rely on the program to provide a consistent source of employment, albeit on a seasonal basis.<sup>113</sup> The monetary benefits to H-2B employees are also substantial. Due to the economic struggles in their native countries, the H-2B program is often the only legal option for H-2B workers to earn a viable income.<sup>114</sup> For example, in Mexico, the number one country of origin for H-2B employees, 44.2 percent of the population lives in poverty.<sup>115</sup> These economic struggles have only worsened with the persistent drug war and increasing militarization along Mexico's border, leaving H-2 recruitment as the only practical means for Mexican workers to access the U.S. labor market.<sup>116</sup>

In their native countries, many H-2B workers earn barely enough money to feed themselves.<sup>117</sup> Conversely, while working in the United States, H-2B visa holders are guaranteed at least the prevailing minimum wage for their occupation.<sup>118</sup> In fact, continued participation in the H-2B program has afforded some employees the opportunity to advance to supervisory positions with even higher salaries.<sup>119</sup> Additionally, spouses and unmarried minor children of H-2B visa holders are eligible for H-4 visas, allowing them to join the H-2B holder in the United States for the duration of her employment,<sup>120</sup> and may attend school in the United States while they maintain their H-4 status.<sup>121</sup>

During the Senate debate on the program in 2006, Senator Mikulski praised the opportunities that the program affords to foreign workers.<sup>122</sup> She observed that some H-2B workers in Maryland earn up to \$30,000, thereby enabling them to better provide for their family.<sup>123</sup> After visiting some Mexican H-2B participants on Maryland's eastern shore, she noted that "[t]hey earn more money in one summer [in Maryland] than they can earn in 5 years in Mexico. . . . [The program] has enabled them to build a

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113. See Pickral, *supra* note 68, at 1028 (noting that some H-2B workers are so certain in their continued employment that they leave their cars and belongings behind when returning to their home country to reapply for another visa).

114. See INT'L HUMAN RIGHTS LAW CLINIC, AM. UNIV. WASH. COLL. OF LAW & CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., *supra* note 12, at 11–13 (2010) ("By heightening the risk of human trafficking and immigration enforcement for undocumented workers, [increased militarization along the U.S.-Mexico border and the ongoing drug war] have developed a positive feedback loop that increasingly pushes migrants to seek H-2 visa recruitment as the only means to access U.S. employment.").

115. See *Mexico: Poverty at a Glance*, U.S. EMBASSY IN MEXICO (Jan. 2010), [http://photos.state.gov/libraries/mexico/310329/20jul11/Fact\\_Sheet\\_Poverty\\_2010.pdf](http://photos.state.gov/libraries/mexico/310329/20jul11/Fact_Sheet_Poverty_2010.pdf).

116. INT'L HUMAN RIGHTS LAW CLINIC, AM. UNIV. WASH. COLL. OF LAW & CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., *supra* note 12, at 13.

117. See Pickral, *supra* note 68, at 1029.

118. *Id.*

119. See *id.* at 1028–29.

120. See 8 U.S.C. § 1101(a)(15)(H) (2006).

121. See 8 C.F.R. § 248.3(e)(2) (2011).

122. See 152 CONG. REC. 4692, 4703 (2006) (statement of Sen. Mikulski).

123. *Id.*

home, often dig wells in their own native village, even pool some of their money to build a community center.”<sup>124</sup>

The advantages of the H-2B program are not limited to the companies and employees that participate. The USCOC contends that the program helps create jobs and provides opportunities for U.S. workers as well.<sup>125</sup> Hiring H-2B workers allows employers to maintain or increase their volume of business when domestic workers are unwilling to fill H-2B job openings, which further enables employers to hire more domestic workers for higher-skilled supervisory positions.<sup>126</sup> As support, the USCOC cites studies indicating that an increase in H-2B workers is correlated with stronger wage and employment growth in the program’s most popular occupations.<sup>127</sup> Similarly, a survey by the University of Maryland found that every H-2B worker employed at a Maryland seafood processing plant sustained 2.5 additional jobs within the local economy.<sup>128</sup>

### *c. Abuses Within the H-2B Program*

In 2010, the Government Accountability Office<sup>129</sup> (GAO) surveyed ten closed civil and criminal cases, and performed an undercover investigation of H-2B employers and recruiters to determine the extent of illegal activity within the program.<sup>130</sup> The cases depicted several instances of employee exploitation and abuse.<sup>131</sup> For example, a number of cases demonstrated a pattern of employers submitting fraudulent documentation to obtain certification; charging their employees excessive fees for visa, rent, and transportation costs; and failing to pay the prevailing hourly wage.<sup>132</sup> Although many of the cases referenced the employee’s pre-employment expenses, most violations involved employers profiting from these expenses rather than merely declining reimbursement.<sup>133</sup>

As part of their independent investigation, the GAO also visited a number of H-2B job sites and recruiters.<sup>134</sup> Despite the documented cases of fraud and abuse, the GAO’s investigation indicated that the overwhelming majority of recruiters refused to cooperate in labor

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124. *Id.*

125. See Zavodny & Jacoby, *supra* note 4, at 10.

126. *Id.* at 10–11.

127. *Id.* at 17.

128. *Id.* at 11–12 (citing Douglas W. Lipton, *An Economic Analysis of Guest Workers in Maryland’s Blue Crab Industry*, U. MD. SEA GRANT EXTENSION PROGRAM (2008), [http://www.mdsg.umd.edu/store/Crab\\_Brief\\_Guest\\_2008\\_01.pdf](http://www.mdsg.umd.edu/store/Crab_Brief_Guest_2008_01.pdf)).

129. The GAO is an independent, nonpartisan congressional agency whose purpose is to provide Congress with objective advice to ensure accountability of the federal government. See About GAO, U.S. GOV’T ACCOUNTABILITY OFFICE, <http://www.gao.gov/about/index.html> (last visited Feb. 23, 2012).

130. See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 11, at 1.

131. *Id.* at 1, 13.

132. *Id.* at 4.

133. See *id.* at 6–10 (detailing instances of employees charging excessive fees for recruitment, visa, and travel expenses).

134. *Id.* at 10–11.

violations.<sup>135</sup> Moreover, the investigation revealed that most workers had “adequate housing, pay, and working conditions.”<sup>136</sup>

On the other hand, a report that the Southern Poverty Law Center<sup>137</sup> (SPLC) presented to the House Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law paints a far bleaker picture than the GAO’s investigation.<sup>138</sup> According to the SPLC, the H-2B program allows for the systematic abuse and exploitation of workers, and should be completely remodeled.<sup>139</sup> The exploitation commences with the employee’s initial recruitment, as many workers incur substantial debt from loan sharks in order to obtain the funds necessary to participate in the program, such as travel, visa, and hiring fees.<sup>140</sup> This exploitation continues when the workers arrive in the United States, as they are often cheated out of wages and subjected to substandard living and working conditions.<sup>141</sup> Once here, employees are unable to change positions, and are in constant fear that their employer may fire them, resulting in deportation to their native country.<sup>142</sup>

The SPLC asserts that these abuses are not caused by a “few ‘bad apple’ employers,”<sup>143</sup> but are a necessary consequence of the immense power the employer wields over the worker, who is unable to change jobs in response to the abuse because of a lack of visa portability.<sup>144</sup> According to the SPLC, the DOL’s refusal to require employers to reimburse their employees’ transportation and visa costs contributes to this pattern of exploitation by placing workers in a position of “debt peonage.”<sup>145</sup> The SPLC’s findings are supported by a subsequent report on the Maryland crab industry, which also cites the lack of visa portability as the primary reason for abuse.<sup>146</sup>

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135. *Id.* at 10.

136. *Id.* at 11.

137. The Southern Poverty Law Center describes itself as “a nonprofit civil rights organization dedicated to fighting hate and bigotry, and to seeking justice for the most vulnerable members of society.” *Southern Poverty Law Center: Who We Are*, S. POVERTY L. CTR., <http://www.splcenter.org/who-we-are> (last visited Feb. 23, 2012).

138. Bauer, *supra* note 2; *see also H-2B Program: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., and Int’l Law of the Comm. on the Judiciary*, *supra* note 39, at 40–52.

139. Bauer, *supra* note 2, at 1–2.

140. *Id.* at 9–11.

141. *Id.* at 2.

142. *Id.* at 15–17.

143. *Id.* at 20.

144. *Id.* at 11, 15.

145. *Id.* at 42 (recommending that employers be required to cover their guestworkers’ recruitment and transportation costs).

146. *See INT’L HUMAN RIGHTS LAW CLINIC, AM. UNIV. WASH. COLL. OF LAW & CENTRO DE LOS DERECHOS DEL MIGRANTE, INC.*, *supra* note 12, at 5 (“At the heart of [the problem of employee abuse] are regulations that bind guestworkers to a single U.S. employer.”).

*d. Current Trends of the H-2B Program*

The average age of H-2B workers is thirty-two (though the majority of H-2B workers are in their twenties), and of the 47,403 H-2B visas issued in 2010, approximately 86 percent were issued to males.<sup>147</sup> Some of the most popular occupations for H-2B certifications are: landscapers, forest and conservation workers, housekeepers, construction workers, amusement park workers, horse stable attendants, dining room attendants, and crab meat processors.<sup>148</sup>

Currently, workers from fifty-eight different countries are eligible to participate in the H-2B program.<sup>149</sup> The top five countries issued H-2B visas in 2010 were: Mexico (33,375); Jamaica (3,469); Guatemala (2,850); the Philippines (1,518); and South Africa (1,151).<sup>150</sup> These same countries were also the top five H-2B users in 2009.<sup>151</sup> Meanwhile, the most popular destinations for H-2B employees have consistently been Texas, Louisiana, and Florida.<sup>152</sup>

On the whole, the H-2B program has expanded substantially over the past two decades.<sup>153</sup> In fact, the program became so popular that the USCIS consistently exhausted the 66,000-visa cap prematurely.<sup>154</sup> For example, in fiscal year 2004 the USCIS exceeded the statutory cap by March, while in fiscal year 2005, the cap was exceeded in early January.<sup>155</sup> Congress responded by enacting the Save Our Small and Seasonal Businesses Act, which exempted returning H-2B workers from the cap if they had participated in the program in any of the three previous fiscal years.<sup>156</sup> The Act created a separate visa, the H-2R visa, for returning H-2B employees.<sup>157</sup>

Passage of this exemption coincided with record participation in the H-2B program. The DHS issued 122,541 H-2B and H-2R visas in 2006,<sup>158</sup> compared to just 12,200 H-2B visas a decade earlier—an increase of over

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147. See *H-2 Information*, GLOBAL WORKERS JUSTICE ALLIANCE, [http://www.globalworkers.org/migrationdata\\_US\\_more.html#DOS](http://www.globalworkers.org/migrationdata_US_more.html#DOS) (last visited Feb. 23, 2012).

148. See *Statistics for H2A, H2B, and H2R Visas 2006-2009*, GLOBAL WORKERS JUSTICE ALLIANCE, [http://www.globalworkers.org/PDF/061110\\_H2\\_2009.pdf](http://www.globalworkers.org/PDF/061110_H2_2009.pdf) [hereinafter *H-2 Statistics 2006-2009*].

149. Identification of Foreign Countries Whose Nationals Are Eligible to Participate in the H-2A and H-2B Nonimmigrant Worker Programs, 77 Fed. Reg. 2558 (Jan. 18, 2012).

150. See GLOBAL WORKERS JUSTICE ALLIANCE, *supra* note 147.

151. See *H-2 Statistics 2006-2009*, *supra* note 148.

152. See *id.*

153. See Read, *supra* note 32, at 436-37.

154. See Pickral, *supra* note 68, at 1014-15 (discussing the steady expansion of the H-2B program).

155. *Id.*

156. See Pub. L. No. 109-13 § 402, 119 Stat. 231, 318 (2005). The exemption was set to expire in 2007, but Congress renewed it in an unrelated bill. See John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. 109-364, § 1074, 120 Stat. 2083, 2403 (2006).

157. See Pub. L. No. 109-13 § 402, 119 Stat. at 318.

158. See *Nonimmigrant Visas 2006-2010*, *supra* note 47.

1,000 percent.<sup>159</sup> Despite the apparent success and utility of the exemption, Congress ultimately declined to renew it when it expired in 2007, and subsequent attempts to revive the exemption have failed.<sup>160</sup>

Although the H-2B program has experienced substantial growth since its inception, the number of H-2B visas issued has declined drastically over the past three years. Below is a table detailing the drop off:

<i>Select Non-immigrant Visas Issued Since 2007</i>				
<i>Visa</i>	<i>2007</i> <sup>161</sup>	<i>2008</i> <sup>162</sup>	<i>2009</i> <sup>163</sup>	<i>2010</i> <sup>164</sup>
H-2B	60,227	94,304 <sup>165</sup>	44,847	47,403
H-2R	69,320	-	-	-
H-2A	50,791	64,404	60,112	55,921
H-1B <sup>166</sup>	154,053	129,464	110,367	117,409
Total	6,444,285	6,603,076	5,804,182	6,422,751

The data show that between 2007 and 2009 the total number of non-immigrant visas issued declined nearly 10 percent.<sup>167</sup> Meanwhile, the total number of visas issued for new and returning H-2B workers declined 65 percent during the same period.<sup>168</sup> Though part of this discrepancy owes to the expiring exemption for returning H-2B workers (that is to say, H-2R workers), the data still demonstrate that H-2B participation declined at a disproportionate rate in 2009.<sup>169</sup>

Between 2008 and 2009 (when the exemption was no longer in effect), H-2B participation fell 52 percent to its lowest level in nearly a decade, while total non-immigrant visas experienced a 12 percent decline.<sup>170</sup> And

159. See *Classes of Nonimmigrants Issued Visas Fiscal Years 1992-1996*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, <http://www.travel.state.gov/pdf/NIVClassIssued-DetailedFY1992-1996.pdf>.

160. See Pickral, *supra* note 68, at 1016–17 (describing the failed attempts of Maryland Senator Barbara Mikulski to renew the exemption after it expired).

161. See *NIV Workload by Category FY-2007*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, <http://travel.state.gov/pdf/FY2007.pdf>.

162. See *NIV Workload by Category FY-2008*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, <http://travel.state.gov/pdf/FY2008.pdf>.

163. See *NIV Workload by Category FY-2009*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, <http://www.travel.state.gov/pdf/FY2009NIVWorkloadbyVisaCategory.pdf>.

164. See *NIV Workload by Category FY-2010*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, <http://www.travel.state.gov/pdf/FY2010NIVWorkloadbyVisaCategory.pdf>.

165. For unknown reasons, the USCIS exceeded the 66,000-visa cap in 2008.

166. See 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2006). H-1B visas are for workers from “specialty occupation[s]” of “distinguished merit and ability.” *Id.* The most popular occupations for H-1B visa holders are in the fields of information technology, engineering, and architecture. Kristen Ness Ayers & Scott D. Syfert, *U.S. Visa Options and Strategies for the Information Technology Industry*, 27 N.C. J. INT'L L. & COM. REG. 301, 308–09 (2001).

167. See *supra* notes 161–63 and accompanying text.

168. See *supra* notes 161–63 and accompanying text. Though it would appear that the expiration of the H-2R visa played a substantial role in this decline, the exemption would have been unnecessary as H-2B visa issuances fell below the 66,000 cap, and thus the effects of its expiration were minimal. See *infra* note 178 and accompanying text.

169. See *supra* notes 161–63 and accompanying text.

170. See *supra* notes 162–63 and accompanying text.

while the total number of non-immigrant visas issued rebounded in 2010 to within 1 percent of its 2007 total, the total number of H-2B visas remained 63 percent below its total for 2007.<sup>171</sup>

When compared to other temporary work visas, the disproportionate decline in H-2B participation becomes even more apparent.<sup>172</sup> For instance, the H-1B visa program, which enables U.S. employers to hire non-immigrant aliens in specialized occupations,<sup>173</sup> experienced a 24 percent decline in participation between 2007 and 2010.<sup>174</sup> H-2B participation, on the other hand, dropped 63 percent for the same period.<sup>175</sup> Similarly, between 2008 and 2009, H-1B participation fell just over 14 percent while H-2B participation declined by 52 percent.<sup>176</sup> And while H-1B participation still exceeded its statutory cap during this interval,<sup>177</sup> H-2B participation fell below its cap for the first time since 2002 and remained below its cap in 2010.<sup>178</sup> Likewise, H-2B participation declined at a much faster rate than the H-2A program. Between 2006 and 2010, the number of H-2A visas actually increased over 50 percent, and between 2008 and 2009 it experienced a mere 6 percent decline in participation.<sup>179</sup>

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171. Compare *NIV Workload by Category FY-2010*, *supra* note 164, with *NIV Workload by Category FY-2007*, *supra* note 161. For the purposes of this calculation, H-2R visas were grouped with H-2B visas.

172. See *Nonimmigrant Visas 2006–2010*, *supra* note 47 (listing all nonimmigrant visas and their descriptions).

173. 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2006). The INA states that a specialty occupation is “an occupation that requires . . . theoretical and practical application of a body of highly specialized knowledge, and . . . attainment of a bachelor’s or higher degree in the specific specialty . . . as a minimum for entry into the occupation in the United States.” *Id.* § 1184(i). Although there is a statutory cap of 65,000 H-1B visas, there are a number of exemptions. See USCIS to Start Accepting H-1B Petitions for FY 2012 on April 1, 2011 (Mar. 18, 2011), U.S. CITIZENSHIP AND IMMIGRATION SERVS., DEP’T OF HOMELAND SEC., <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=31f803aea7ace210VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD> (noting the various exemptions for 2012).

174. See *Nonimmigrant Visas 2006–2010*, *supra* note 47.

175. See *id.* (H-2R visas are included to calculate total H-2B participation).

176. See *id.*

177. See Christine Chester & Amanda Cully, Note, *Putting a Plug in America’s Brain Drain: A Proposal to Increase U.S. Retention of Foreign Students Post-Graduation*, 28 HOFSTRA LAB. & EMP. L.J. 385, 409–10 (2011) (“In fiscal years 2007, 2008, and 2009, the quota for H-1B visas was met within fifty-six days, three days, and seven days, respectively.”).

178. Compare *Nonimmigrant Visas 2006–2010*, *supra* note 47, with *Nonimmigrant Visas 2002–2006*, *supra* note 46.

179. See *Nonimmigrant Visas 2006–2010*, *supra* note 47. Although H-2 workers represent only a small portion of the total number of authorized foreign workers, these numbers are still nowhere near the estimated 10,790,000 unauthorized immigrants in the United States. See Michael Hoefler et al., *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2010*, OFFICE OF IMMIGRATION STATISTICS, DEP’T OF HOMELAND SECURITY 3 (2011), [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2010.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2010.pdf).

*B. The Fair Labor Standards Act*

The Fair Labor Standards Act of 1938 protects both documented and undocumented migrant workers from certain work-related abuses.<sup>180</sup> For instance, the FLSA established a federal minimum wage, which is currently set at \$7.25 an hour.<sup>181</sup> The FLSA also requires employers to pay their employees one and one-half times the employee's regular rate for hours worked beyond forty each week.<sup>182</sup> Perhaps most importantly, the FLSA empowers workers to sue their employers for the sum of their unpaid wages, an equal amount in liquidated damages, and their attorney's fees and costs for violations of the Act.<sup>183</sup>

Before the enactment of the FLSA, it was customary for employers to pay their employees in board, lodging, and "other facilities."<sup>184</sup> After investigating this practice, Congress determined that many employers avoided paying their employees their bargained-for wages by charging them excessive fees for such facilities.<sup>185</sup> Concerned that the continuation of this practice might enable employers to circumvent the minimum wage requirements to be included in the FLSA, Congress decided to address this method of payment within the Act.<sup>186</sup> Rather than eliminate the practice entirely, however, Congress authorized the DOL to adopt regulations to protect employees from employers' attempts to recapture any portion of an employee's minimum wage.<sup>187</sup>

Under the FLSA, an employee's "wage" includes "the reasonable cost . . . to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging or other facilities are customarily furnished by such employer to her employees."<sup>188</sup> The "reasonable cost" provision was intended to prevent employers from profiting from their employees by substituting "other facilities" for cash wages and overcharging for such facilities.<sup>189</sup> Regulations governing wage payments under the FLSA further specify that "other facilities" must be similar to

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180. See 29 U.S.C. § 201 (2006); see also *Patel v. Quality Inn S.*, 846 F.2d 700, 706 (11th Cir. 1988) ("In short, we hold that undocumented workers are 'employees' within the meaning of the FLSA and that such workers can bring an action under the act for unpaid wages and liquidated damages."); *Contreras v. Corinthian Vigor Ins. Brokerage, Inc.*, 25 F. Supp. 2d 1053, 1056 (N.D. Cal. 1998) ("There is no question that the protections provided by the FLSA apply to undocumented aliens.").

181. 29 U.S.C. § 206(a)(1)(C).

182. *Id.* § 207(a)(1).

183. *Id.* § 216(b)–(c).

184. Herman A. Wecht, *Limitations on Wage Deductions Under the Fair Labor Standards Act*, 14 U. PITT. L. REV. 233, 233 (1953).

185. *Id.*

186. *Id.*

187. *Id.* at 233–34. These regulations have been judicially construed to be legislative in character and are therefore binding on the courts "unless palpably arbitrary or capricious, or unless otherwise unconstitutional." *Id.* at 239 (citing *Walling v. Peavey-Wilson Lumber Co.*, 49 F. Supp. 846 (W.D. La. 1943)); see also *infra* notes 203–18 and accompanying text.

188. 29 U.S.C. § 203(m).

189. Wecht, *supra* note 184, at 237. The regulations note that the reasonable cost to the employer of furnishing board, lodging, or other facilities may not be more than the actual cost and may not include a profit to the employer. 29 C.F.R. § 531.3 (2011).

board or lodging.<sup>190</sup> The regulations are explicit, however, that these facilities include “transportation furnished employees between their homes and work where the travel time does not constitute hours worked compensable under the Act and the transportation is not an incident of and necessary to the employment.”<sup>191</sup>

The regulations further provide that “the cost of furnishing ‘facilities’ which are primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages.”<sup>192</sup> Courts will often apply a “balancing of benefits test” to determine whether the facility in question was primarily for the benefit of the employer.<sup>193</sup> The regulations provide a number of examples of expenses considered to be primarily for the benefit of the employer, such as the cost of uniforms, safety equipment, employee security, and “transportation charges where such transportation is an incident of and necessary to the employment (as in the case of maintenance-of-way employees of a railroad).”<sup>194</sup> The regulations include the following illustrations of transportation expenses that are incident of and necessary to the employment: “amount[s] expended by an employee, who is traveling ‘over the road’ on his employer’s business” and “amount[s] expended by an employee as temporary excess home-to-work travel expenses incurred (i) because the employer has moved the plant to another town” or “(ii) because the employee, on a particular occasion, is required to report for work at a place other than his regular workplace.”<sup>195</sup>

Whether the employer pays her employees in cash or in “facilities,” wages must be paid “free and clear.”<sup>196</sup> This wage requirement will not be met where the employee “kicks-back” part of the wage delivered to the employee.<sup>197</sup> An employer-imposed expense is a kick-back if it “tend[s] to shift part of the employer’s business expense to the employees.”<sup>198</sup> Therefore, in the context of the H-2B program, if the employee’s transportation, visa, and recruitment costs are considered a business expense primarily for the benefit or convenience of the employer, and the employer’s failure to reimburse these costs reduces the employee’s wages below the statutory minimum, the employer will have violated the FLSA.<sup>199</sup> Notably, however, “these restrictions do not at all deny employers the right to pay wages in whole or part in facilities furnished either as additions to a

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190. 29 C.F.R. § 531.32(a).

191. *Id.*

192. *Id.* § 531.32(c).

193. *See, e.g.,* *Soler v. G. & U., Inc.*, 833 F.2d 1104, 1109 (2d Cir. 1987) (“[T]he balancing of benefits test established by the Regulation provides a common-sense and logical approach to resolve the reasonableness of costs for facilities *other than lodging and board* that may be counted toward the payment of an employee’s wage.”).

194. 29 C.F.R. § 531.32.

195. *Id.* § 778.217.

196. *Id.* § 531.35.

197. *Id.*

198. *See Mayhue’s Super Liquor Stores, Inc. v. Hodgson*, 464 F.2d 1196, 1199 (5th Cir. 1972).

199. *See Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228, 1237 (11th Cir. 2002).

stipulated wage or as items for which deductions from agreed-upon wages will be made.”<sup>200</sup> Rather, they are intended to frustrate an employer’s attempts to circumvent the minimum wage and overtime requirements of the FLSA.<sup>201</sup>

Courts interpreting this provision in the context of the H-2B program have disagreed as to whether an employee’s transportation and visa expenses are “primarily for the benefit or convenience of the employer.”<sup>202</sup> Courts have therefore arrived at opposite conclusions when determining whether an H-2B employer commits an FLSA violation by declining to reimburse these expenses (if paid by the employee) or deducting these expenses (if paid by the employer) and thereby dragging the employee’s wages below the statutory minimum.

### C. *The Department of Labor and the Administrative Scheme*

The DOL is an administrative agency created by Congress “to foster, promote, and develop the welfare of the wage earners of the United States.”<sup>203</sup> When Congress passed the FLSA in 1938, it expressly granted the DOL the authority to promulgate necessary rules and regulations to administer the Act.<sup>204</sup> The power of the DOL to administer the FLSA “necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.”<sup>205</sup> Therefore, according to the Supreme Court’s decision in *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, a court will afford these regulations controlling weight unless they are “arbitrary, capricious, or manifestly contrary to the statute.”<sup>206</sup>

When applying this standard, a court will defer to the agency’s interpretation of a statute if (i) the statute is silent as to the precise question at issue and (ii) the agency’s interpretation is reasonable.<sup>207</sup> In assessing whether the agency’s interpretation of an ambiguous statute is reasonable, a court will consider its consistency with the statute’s plain language,<sup>208</sup> the

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200. Wecht, *supra* note 184, at 243.

201. *Id.*

202. See *Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393, 400–04 (5th Cir. 2010) (en banc) (holding that an H-2B employee’s travel, visa, and recruitment expenses were not “primarily for the benefit and convenience of the employer” and therefore not reimbursable under the FLSA (citations omitted)). *But see* *Teoba v. Trugreen Landcare LLC*, 769 F. Supp. 2d 175, 185 (W.D.N.Y. 2011) (“[V]isa and transportation costs of H-2B employees are unique costs of doing business, primarily benefiting employers, which cannot be passed on to employees either directly or indirectly, if doing so would reduce the employees’ wages below minimum wage.”).

203. See An Act to Create a Department of Labor, Pub. L. No. 62-426, § 1, 37 Stat. 736 (1913).

204. See 29 U.S.C. § 259 (2006).

205. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

206. *Id.* at 844.

207. *Id.* at 842–43.

208. *Nat’l R.R. Passenger Corp. v. Bos. & Me. Corp.*, 503 U.S. 407, 417 (1992).

congressional purpose underlying the statute,<sup>209</sup> the statute's legislative history,<sup>210</sup> congressional action or inaction regarding the interpretation,<sup>211</sup> and the time between the interpretation and the enactment being construed.<sup>212</sup>

Under the Administrative Procedure Act, federal agencies may engage in rulemaking by publishing notice of the proposed rule in the Federal Register, allowing interested persons to comment on the proposal, and considering these comments in promulgating its final rule.<sup>213</sup> Agency interpretations promulgated through this process are entitled to “*Chevron* deference,” while those advanced through less formal means, such as opinion letters and field manuals, are not controlling.<sup>214</sup> Nevertheless, these informal interpretations “constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”<sup>215</sup> Accordingly, the Supreme Court held in *Skidmore v. Swift* that the degree of deference to be given to an informal interpretation depends on “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”<sup>216</sup>

That an agency may have changed its interpretation over time does not automatically render the challenged interpretation unreasonable, particularly where the change resulted from a reasoned analysis and formal rulemaking.<sup>217</sup> Nevertheless, “[a]n agency interpretation of a relevant provision which conflicts with the agency’s earlier interpretation is entitled to considerably less deference than a consistently held agency view.”<sup>218</sup>

#### *D. Arriaga and the Eleventh Circuit’s Application of the FLSA to the H-2A Program*

In *Arriaga v. Florida Pacific Farms, L.L.C.*,<sup>219</sup> the Eleventh Circuit heard a case concerning whether Florida growers participating in the H-2A

209. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985).

210. *Nationsbank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257–58 (1995).

211. *Young v. Cmty. Nutrition Inst.*, 476 U.S. 974, 983 (1986).

212. *See N.L.R.B. v. United Food and Commercial Workers Union Local 23*, 484 U.S. 112, 124 n.20 (1987) (“We also consider the consistency with which an agency interpretation has been applied, and whether the interpretation was contemporaneous with the enactment of the statute being construed.”).

213. *See* Administrative Procedure Act, 5 U.S.C. § 553 (2006).

214. *See United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

215. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

216. *Id.*

217. *See Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996) (“Of course the mere fact that an agency interpretation contradicts a prior agency position is not fatal. Sudden and unexplained change, or change that does not take account of legitimate reliance on prior interpretation, may be ‘arbitrary, capricious [or] an abuse of discretion.’” (internal citations omitted) (quoting 5 U.S.C. § 706(2)(A))).

218. *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) (internal quotation marks omitted).

219. 305 F.3d 1228 (11th Cir. 2002).

temporary worker program who declined to reimburse their Mexican employees for their transportation, visa, and recruitment expenses were guilty of FLSA violations for failing to pay their employees the minimum wage.<sup>220</sup> The district court found that these expenses were not “primarily for the benefit of the employer” as defined by the DOL and FLSA regulations, and granted summary judgment for the defendants.<sup>221</sup> The Eleventh Circuit reversed, holding that the employer was required to reimburse the employees’ transportation and visa expenses, but not their recruitment fees.<sup>222</sup>

The growers, in compliance with H-2A regulations,<sup>223</sup> had compensated their employees for their travel expenses from the recruitment site to the job site, and provided return transportation at the end of the contract period.<sup>224</sup> At issue were the costs for transportation from the workers’ homes to the recruitment site, visa costs, and payments required by the Mexican recruiter used by the employer.<sup>225</sup> Though these expenses do not explicitly require reimbursement under the H-2A regulations, the court reasoned that they might require reimbursement under the FLSA.<sup>226</sup>

Relying on Supreme Court precedent, the court noted that when employment statutes overlap, as in the case of the H-2A regulations and the FLSA, the court must apply the more labor-protective requirement unless the demands are mutually exclusive.<sup>227</sup> Accordingly, the court found that the growers were required to reimburse their employees for any expense determined to be primarily for the growers’ benefit under the FLSA.<sup>228</sup> The court further observed that although the workers’ salaries exceeded the minimum wage and the growers had not deducted these costs from the workers’ paycheck, “there is no legal difference between deducting a cost directly from the worker’s wages and shifting a cost, which they could not deduct, for the employee to bear.”<sup>229</sup>

In an effort to establish that these expenses were primarily for the benefit of the employer, the H-2A workers argued, and the Eleventh Circuit agreed, that the district court failed to give appropriate *Skidmore* deference to DOL opinion letters which had interpreted transportation costs incidental to the employer’s recruitment as primarily for the benefit of the employer.<sup>230</sup> Nevertheless, the court found that these interpretations lacked any reasoning

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220. *Id.*

221. *Id.* at 1232.

222. *Id.* at 1241–46.

223. *See supra* notes 41–43 and accompanying text.

224. *Arriaga*, 305 F.3d at 1234.

225. *Id.*

226. *Id.* at 1235 (citing 20 C.F.R. § 655.103(b)).

227. *Id.* (citing *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 519 (1950)).

228. *Id.* at 1237.

229. *Id.* at 1236.

230. *Id.* at 1238–39 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

or explanation, and disregarded them.<sup>231</sup> The court therefore turned to the plain language of the regulations.<sup>232</sup>

The court observed that transportation furnished to employees between their homes and work is not compensable under the FLSA where the employee is not compensated for travel time and the transportation is not “an incident of and necessary to the employment.”<sup>233</sup> However, where transportation is incident of and necessary to the employment, these expenses are “primarily for the benefit of the employer.”<sup>234</sup> The court considered the dictionary definitions of the terms “incident” and “necessary,” and concluded that the transportation and visa costs were covered by this provision.<sup>235</sup> It reasoned that an H-2A worker’s long-distance transportation costs are unlike expenses related to daily commuting between home and work, and are an inevitable and inescapable consequence of employing foreign workers.<sup>236</sup> The court further observed a “line being drawn between those costs arising from the employment itself and those that would arise in the course of ordinary life.”<sup>237</sup> Those expenses that are “primarily [for the] benefit [of] the employee are universally ordinary living expenses that one would incur in the course of life outside of the workplace.”<sup>238</sup> The court likened the costs of transportation to charges for uniforms, a nuanced category that could be for the benefit of the employer or the employee depending on the context.<sup>239</sup> It reasoned that transportation between home and work is similar to a dress code of ordinary street clothing, which is an expense that is not primarily for the benefit of the employer because it is a normal living expense.<sup>240</sup> Conversely, an H-2A employee’s initial transportation is similar to a rental uniform, which is an expense that primarily benefits the employer because the employee would not incur this cost in the ordinary course of life.<sup>241</sup>

Similarly, the court reasoned that the employee’s visa and immigration expenses must be reimbursed because they too would not arise as an ordinary living expense.<sup>242</sup> According to the court, the employers created the need for such costs, and therefore could not pass them off to their employees as “other facilities.”<sup>243</sup>

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231. *Id.* at 1238–39 (citing Opinion Letter from Wage & Hour Div., Dep’t of Labor (June 27, 1990), 1990 WL 712744; Opinion Letter from Wage & Hour Div., Dep’t of Labor (Nov. 10, 1970), 1970 WL 26461).

232. *Id.* at 1241.

233. *Id.* (citing 29 C.F.R. § 531.32).

234. *Id.* at 1241–42 (citing 29 C.F.R. § 531.32).

235. *Id.* at 1242.

236. *Id.*

237. *Id.*

238. *Id.* at 1243 (internal quotation marks omitted).

239. *Id.*

240. *Id.* at 1243–44.

241. *Id.*

242. *Id.* at 1244.

243. *Id.*

Lastly, relying on the principles of agency law, the court dismissed the workers' claims for recruitment expenses.<sup>244</sup>

*E. The Department of Labor's Shift in Policy and Proposed Interpretation of the FLSA*

1. The Department of Labor's 2008 Final Rule

On December 19, 2008, the DOL published a final rule to modernize the H-2B certification process and to establish certain regulations governing the responsibilities of H-2B employers (2008 Rule).<sup>245</sup> The 2008 Rule declared that an employer's H-2B application fees, domestic recruitment costs, and administrative costs associated with obtaining certification were the employer's responsibility and could not be passed on to the employee regardless of any benefit these expenses might confer to the employee.<sup>246</sup> The stated purpose of this provision was to protect the wages of the foreign worker from unwarranted deductions.<sup>247</sup> Nevertheless, the rule also declared that the DOL "will continue to permit employers, consistent with the [FLSA], to make deductions from a worker's pay for the reasonable cost of furnishing housing and transportation, as well as worker expenses such as passport and visa fees."<sup>248</sup>

In so concluding, the DOL explicitly disagreed with the Eleventh Circuit's decision in *Arriaga* and the holdings of a number of district courts that have since applied *Arriaga's* reasoning to the H-2B program.<sup>249</sup> The DOL affirmed that the employer still may not deduct the cost of facilities considered to be "primarily for the benefit or convenience of the employer,"<sup>250</sup> nor may it require its employees to provide "tools of the trade" that are necessary to the employer's business.<sup>251</sup> However, the rule concluded that "as a general matter and in the specific context of guest worker programs, employee relocation costs are not typically considered to be 'primarily for the benefit' of the employer."<sup>252</sup> Consequently, the DOL reasoned that an H-2B worker's transportation expenses are either primarily

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244. *Id.* at 1244–46 ("Because the Farmworkers have failed to allege facts to support the creation of apparent authority, the Growers are not liable for the recruitment fees.").

245. *See* Labor Certification Process and Enforcement for H-2B Workers and Other Technical Changes, 73 Fed. Reg. 78,020 (Dec. 19, 2008) (withdrawn by 74 Fed. Reg. 13,261 (Mar. 26, 2009)).

246. *Id.* at 78,038–39.

247. *Id.* at 78,039.

248. *Id.*

249. *Id.* (citing *De Leon-Granados v. Eller & Sons Trees, Inc.*, 581 F. Supp. 2d 1295 (N.D. Ga. 2008); *Rosales v. Hispanic Emp. Leasing Program, LLC*, No. 1:06-CV-877, 2008 WL 363479, at \*1 (W.D. Mich. Feb. 11, 2008); *Rivera v. Brickman Grp., Ltd.*, No. 05-1518, 2008 WL 81570, at \*1 (E.D. Pa. Jan. 7, 2008); *Recinos-Recinos v. Express Forestry, Inc.*, No. 05-1355, 2006 WL 197030, at \*1 (E.D. La. Jan. 24, 2006)).

250. *Id.* (quoting 29 C.F.R. § 531.3(d)(1)).

251. *Id.* at 78,040 (quoting 29 C.F.R. § 531.35). Such a requirement would constitute a kick-back for the purposes of the regulations. *See supra* notes 196–201 and accompanying text (describing "kick-backs").

252. 73 Fed. Reg. at 78,040.

for the benefit of the employee, or they benefit the employee and employer equally.<sup>253</sup>

Weighing the relative benefits derived from the employee's relocation costs, the 2008 Rule noted that these expenses enable H-2B workers to earn more money than in their native countries, while also allowing them to live and engage in non-work activities in the United States.<sup>254</sup> As evidence for the value of these benefits, the DOL cited the substantial sacrifices, monetary and otherwise, workers endure to participate in the program.<sup>255</sup> The DOL acknowledged that employers might derive a greater-than-usual benefit from these expenses because of their inability to recruit U.S. workers and their specific need to hire non-local workers—a predicate to participation.<sup>256</sup> Similarly, the DOL conceded that the workers might derive a less-than-usual benefit from these expenses because of the temporary nature of their employment.<sup>257</sup> Nevertheless, the DOL concluded that “the substantially greater benefit that foreign guest workers generally derive from work opportunities in the United States than they do from employment opportunities in their home countries . . . at most brings the balance of benefits between the employer and the worker into equipoise.”<sup>258</sup>

According to the regulations promulgated under the FLSA, the cost of “transportation furnished employees between their homes and work where the travel time does not constitute hours worked compensable under the Act and the transportation is not incident of and necessary to the employment” may be considered part of a worker's wage.<sup>259</sup> The *Arriaga* court reasoned that this provision applied only to ordinary commuting costs, not to H-2A relocation expenses, because these costs do not arise in the ordinary course of life.<sup>260</sup> Responding to this argument, the DOL emphasized that the regulations make no distinction between commuting and relocation expenses.<sup>261</sup> Both costs are incurred for the purpose of getting to work, and neither would arise but for the existence of the job.<sup>262</sup> Accordingly, the 2008 Rule concluded that the relocation expenses in question are not “incident of and necessary to the employment.”<sup>263</sup>

An employer's mere need to hire non-local workers does not transform an employee's relocation costs into an “incident” of the employment.<sup>264</sup> To qualify as such, the expenses “must have a more direct and palpable connection to the job in question than merely serving to bring the employee

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253. *Id.*

254. *Id.*

255. *Id.* at 78,040–41.

256. *Id.* at 78,041.

257. *Id.*

258. *Id.*

259. *Id.* (quoting 29 C.F.R. § 531.32(a)).

260. *Id.* (citing *Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228, 1242 (11th Cir. 2002)).

261. *Id.*

262. *Id.*

263. *Id.* (quoting 29 C.F.R. § 531.32(c)).

264. *Id.*

to the work site.”<sup>265</sup> Qualifying expenses might include those relating to a business trip, or relocation expenses necessary for an employee to retain her job.<sup>266</sup> Relocation costs to begin a new job, however, will rarely satisfy this test.<sup>267</sup>

## 2. The Shift in the DOL’s H-2B Policies

Under the Obama Administration the DOL has made a number of changes to the H-2B program. On March 26, 2009, the DOL withdrew its interpretation of the FLSA’s requirements of H-2B employers found in the 2008 Rule.<sup>268</sup> As a reason for the withdrawal, the DOL cited the “potential adverse impacts [that a policy of non-reimbursement] might have on our Nation’s most vulnerable workers.”<sup>269</sup> This withdrawal signaled a shift in the DOL’s overall policy towards the H-2B program, which has since undergone a number of changes designed to better protect H-2B workers.<sup>270</sup>

On March 18, 2011, the DOL issued a Notice of Proposed Rulemaking (NPRM) that sought to amend the regulations governing the H-2B program.<sup>271</sup> Of particular relevance to this Note<sup>272</sup> are changes to the requirements pertaining to reimbursement of certain pre-employment expenses of H-2B employees. The NPRM declared that “[t]he [DOL] has

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265. *Id.*

266. *Id.*

267. *Id.*

268. Withdrawal of Interpretation of the Fair Labor Standards Act Concerning Relocation Expenses Incurred by H-2A and H-2B Workers, 74 Fed. Reg. 13,261 (Mar. 26, 2009).

269. *Id.* at 13,262.

270. Perhaps the most controversial change in policy has been the DOL’s rule amending the methodology used to calculate the prevailing wage that H-2B employers must pay their employees. *See* Wage Methodology for the Temporary Non-agricultural Employment H-2B Program, 76 Fed. Reg. 3,452 (Jan. 19, 2011) (to be codified at 20 C.F.R. pt. 655). Following two separate lawsuits challenging the rule and legislation prohibiting the DOL from expending any funds to enforce the rule, the DOL has delayed the rule’s implementation until October 1, 2012. *See* Wage Methodology for the Temporary Non-agricultural Employment H-2B Program; Delay of Effective Date, 76 Fed. Reg. 82,115 (Dec. 30, 2011). Employers argue that these new regulations could result in wage increases of up to 83 percent of current hourly rates, which “would be crippling and would expose [H-2B employers] to unwinnable competition . . . from other businesses that hire illegal immigrants.” Julia Preston, *La. Business Owners Sue Over New Rules for Guest Workers*, N.Y. TIMES, Sept. 12, 2011, at A12. Meanwhile, employee advocacy groups argue that the fears of H-2B employers are exaggerated, and that the new wage rates would merely equal the average wages for the occupation in the industry within which the H-2B worker is employed. Margaret Moslander, *New Labor Regs for Non-agricultural Guest Workers Around the Corner*, REMAPPING DEBATE (Oct. 12, 2011), <http://www.remappingdebate.org/article/new-labor-regs-non-agricultural-guest-workers-around-corner>.

271. Temporary Non-agricultural Employment of H-2B Aliens in the United States, 76 Fed. Reg. 15,130 (proposed Mar. 18, 2011) (to be codified at 20 C.F.R. pt. 655).

272. The NPRM proposed significant changes to the H-2B program, imposing a number of new obligations on H-2B employers that are beyond the scope of this Note. For example, the NPRM reinforced the disclosure requirements of H-2B employers by requiring the employer to include all rights, protections, benefits, wages, working conditions, and deductions in the job order. *Id.* at 15,141. In addition, the NPRM would require the employers to guarantee payment of wages for at least three-fourths of the contract period. *Id.* at 15,141–42. The NPRM would also create an electronic job registry to help alert U.S. workers to jobs for which H-2B workers are being recruited. *Id.* at 15,149.

determined that the cost of transporting workers from remote locations to the worksite is an expense that primarily benefits employers” and that “it is the [DOL]’s intention to ensure that the cost of transporting workers from remote locations to the worksite are not passed on to the employees.”<sup>273</sup> The proposed rule therefore required the H-2B job order to disclose that the employer would provide, pay for, or fully reimburse the worker for visa-related fees, inbound and outbound transportation, and daily subsistence costs.<sup>274</sup>

Despite strong opposition from both H-2B employers and legislators attempting to prohibit the DOL from finalizing the proposed rule,<sup>275</sup> the DOL published a final rule on February 21, 2012, and it is scheduled to go into effect on April 23, 2012.<sup>276</sup> Addressing transportation and subsistence expenses, the 2012 Rule requires employers to “pay for the transportation and subsistence directly, advance at a minimum, the most economical and reasonable common carrier cost, or reimburse the worker’s reasonable costs if the worker completes 50 percent of the period of employment.”<sup>277</sup> Furthermore, the rule also requires the employer to provide return transportation if the worker completes the period of employment or is dismissed prior to completion.<sup>278</sup> The DOL notes that these requirements extend to both H-2B employees and to U.S. employees that are not reasonably able to return to their residence each day.<sup>279</sup> Addressing other pre-employment expenses, the 2012 Rule also requires employers to reimburse all visa, visa processing, and border crossing fees in the first week of employment.<sup>280</sup>

Although the rule expressly mandates reimbursement of these expenses, the DOL continues to remind employers that the FLSA imposes independent wage payment obligations.<sup>281</sup> Relying on the arguments put forth in *Arriaga*, the rule declares that “[t]he Department continues to believe that under the FLSA the transportation, subsistence, and visa and related expenses for H-2B workers are for the primary benefit of employers.”<sup>282</sup>

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273. *Id.* at 15,145 (to be codified at 20 C.F.R. § 655.20(j)).

274. *Id.* at 15,142 (to be codified at 20 C.F.R. § 655.18(i)).

275. On October 12, 2011, Representative Rodney Alexander introduced a bill to prohibit the DOL from finalizing or enforcing the proposed rule or any substantially similar rule. H.R. 3162, 112th Cong. (2011).

276. Temporary Non-agricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. 10,038 (Feb. 21, 2012) (to be codified at 20 C.F.R. pt. 655).

277. *Id.* at 10,158 (to be codified at 20 C.F.R. § 655.20(j)).

278. *Id.*

279. *Id.* at 10,154 (to be codified at 20 C.F.R. § 655.18(a)).

280. *Id.* at 10,158 (to be codified at 20 C.F.R. § 655.20(j)).

281. *Id.* at 10,077 (“[T]he Final Rule adds a reminder to employers that the FLSA applies independently of the H-2B requirements. . . . [E]mployers covered by the FLSA must pay such expenses to nonexempt employees in the first workweek, to the level necessary to meet the FLSA minimum wage (outside the Fifth Circuit).”).

282. *Id.*

## II. CONFLICTING INTERPRETATIONS OF THE FLSA'S DEMANDS ON H-2B EMPLOYERS

Courts have disagreed over what the FLSA requires of H-2B employers. Part II examines the opposing arguments as to whether H-2B employers must cover their employees' pre-employment expenses. Part II.A considers the Fifth Circuit's approach to the issue, as well as a recent district court opinion applying the Fifth Circuit's reasoning to the H-2A program. Part II.B explores the DOL's treatment of the issue since 2009 and recent district court cases concluding that a failure to reimburse these expenses may result in a violation of the FLSA.

### A. Interpretations of the FLSA Not Requiring Reimbursement of the Employee's Pre-employment Expenses

#### 1. The Fifth Circuit's Approach in *Castellanos-Contreras v. Decatur Hotels*

In *Castellanos-Contreras v. Decatur Hotels, LLC*,<sup>283</sup> the Fifth Circuit considered the same question posed in *Arriaga*,<sup>284</sup> but in the context of the H-2B program. The case involved 100 H-2B workers from various Latin American countries who provided services to a New Orleans hotel after Hurricane Katrina.<sup>285</sup> To participate in the program, the workers incurred several pre-employment expenses, including placement fees charged by local recruiters, visa-application fees, and transportation costs necessary to relocate to the worksite.<sup>286</sup> These expenses totaled between \$3,000 and \$5,000 per employee.<sup>287</sup> The defendant-employer did not reimburse the workers for any of these expenses, though it did incur its own recruitment and application fees.<sup>288</sup> The workers sued the hotel under the FLSA, alleging that these expenses were "primarily for the benefit and convenience of the employer"<sup>289</sup> and that therefore the defendant's failure to reimburse them in the first work week constituted a minimum wage violation.<sup>290</sup>

Preceding appeal, the district court held that the provisions of the FLSA apply to temporary non-agricultural workers.<sup>291</sup> The employer sought interlocutory appeal on this issue, and the Fifth Circuit held that, while H-2B workers are entitled to protection under the FLSA, the FLSA does not

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283. 622 F.3d 393 (5th Cir. 2010) (en banc).

284. *Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228 (11th Cir. 2002).

285. *Castellanos-Contreras*, 622 F.3d at 396.

286. *Id.*

287. *Castellanos-Contreras v. Decatur Hotels, LLC*, 576 F.3d 274, 278 (5th Cir. 2009), *aff'd en banc*, 622 F.3d 393.

288. *Castellanos-Contreras*, 622 F.3d at 396.

289. *Id.* at 400 (citing 29 C.F.R. § 531.35).

290. *Id.* at 400-04.

291. *Castellanos-Contreras v. Decatur Hotels, LLC*, 488 F. Supp. 2d 565, 571-72 (E.D. La. 2007).

require an employer to reimburse such workers for recruitment, visa, or transportation expenses incurred prior to relocating to the United States.<sup>292</sup>

While the case was pending an en banc rehearing, the DOL issued a Field Assistance Bulletin criticizing the Fifth Circuit's decision.<sup>293</sup> Despite the disapproval of the DOL, the Fifth Circuit affirmed its previous holding in a sharply divided en banc opinion.<sup>294</sup> The majority noted that despite the existence of certain provisions requiring reimbursement for inbound expenses of H-2A workers and certain outbound transportation costs for H-2B workers,<sup>295</sup> "[n]o statute or regulation expressly states that inbound travel expenses must be advanced or reimbursed by an employer of an H-2B worker. . . . Similarly, no law or regulation provides that fees for the employee side of the visa application process must be paid by the employer."<sup>296</sup> From this silence, the court inferred a legislative intent not to require reimbursement of these expenses.<sup>297</sup> Noting that the Bulletin was issued long after the alleged FLSA violation, the court declined to consider the merits of the interpretation.<sup>298</sup>

The workers argued that because the visa and travel expenses were required for the performance of their work, and because they could not use these items outside the context of their employment, these expenses were analogous to "tools of the trade" that were primarily for the benefit and convenience of the employer.<sup>299</sup> The regulations identify safety caps, uniforms, and railway fare for maintenance-of-way workers as facilities that are primarily for the benefit of the employer and therefore nondeductible.<sup>300</sup> Relying on these regulations, the court reasoned that a "visa and physical presence at the job site" are too dissimilar to the items listed to be considered tools of the trade.<sup>301</sup>

Addressing the workers' contention that *Arriaga* should be applied to the facts of their case, the court noted that Congress has historically treated H-2A and H-2B workers differently.<sup>302</sup> The court observed that "the H-2 program was specifically redesigned by Congress in 1986 to 'separat[e] agricultural from nonagricultural workers in the administrative scheme.'"<sup>303</sup>

292. *Castellanos-Contreras*, 576 F.3d 274, *aff'd en banc*, 622 F.3d 393 (5th Cir. 2010).

293. FAB 2009-2, *supra* note 22, at 11.

294. *Castellanos-Contreras*, 622 F.3d 393.

295. 8 U.S.C. § 1184(c)(5)(A) (2006) (requiring the employer to pay for the reasonable costs of return transportation if the worker is dismissed before the end of the employment period).

296. *Castellanos-Contreras*, 622 F.3d at 400.

297. *See id.* ("Silence on this issue, in the face of these specific laws governing transportation, is deafening.")

298. *Id.* at 401–02 ("Whatever deference may be due to the Department's informally promulgated Bulletin in the future, it does not itself in any way purport to apply retroactively.")

299. *Id.* at 400–01.

300. 29 C.F.R. § 531.32(c) (2011).

301. *Castellanos-Contreras*, 622 F.3d at 400–01 (citing 29 C.F.R. § 531.32).

302. *Id.* at 402–03 (citing *Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228 (11th Cir. 2002)).

303. *Id.* at 403 (alteration in original) (quoting *Sweet Life v. Dole*, 876 F.2d 402, 406 (5th Cir. 1989)).

Though the regulations specifically provide some transportation reimbursement obligations for H-2A workers, they remain silent on similar expenses incurred by H-2B workers.<sup>304</sup> Accordingly, the court limited *Arriaga* to the H-2A program.<sup>305</sup>

The workers made similar arguments concerning their recruitment expenses.<sup>306</sup> Specifically, they maintained that these fees were required as part of their employment, and as such, should be considered a business expense primarily benefitting the employer.<sup>307</sup> However, the defendant never required that these fees be paid to the recruiter, nor had it required the workers to use the recruiter to apply for the job.<sup>308</sup> The court reasoned that both employer and employee derive benefits from using foreign recruiters to navigate the complicated visa application process.<sup>309</sup> The court held that because the total recruitment expenses had already been apportioned between employer and employee according to each party's respective benefit, the workers' use of the recruiter could not properly be considered the defendant's business expense.<sup>310</sup>

## 2. The District Court of Nevada Endorses the Fifth Circuit's Interpretation of the FLSA

The United States District Court for the District of Nevada applied the Fifth Circuit's reasoning in *Castellanos-Contreras*<sup>311</sup> to the context of the H-2A program, and concluded that an H-2A employer was not required under the FLSA to reimburse her employees for their inbound transportation and subsistence costs.<sup>312</sup> Though this case concerned the H-2A program, the issue before the court was identical to that in *Castellanos-Contreras*, namely, whether the FLSA required an employer to reimburse remotely hired guestworkers for their pre-employment expenses in the first week of employment if not doing so would reduce their wages below the minimum wage.<sup>313</sup> The court observed that the FLSA regulations only required reimbursement of travel expenses "incurred 'over the road' while working for the employer, as well as the expenses incurred when an employer reassigns a worker to a new town after work has begun in another

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304. For example, 20 C.F.R. § 655.202 provides that H-2A employees will be reimbursed the full amount of any deductions made by the employer for transportation and subsistence expenses if the employee is terminated prior to completion of the contract. 20 C.F.R. § 655.202(b)(12)(ii). This section further provides that all transportation deductions must be fully reimbursed to the employee upon completion of 50 percent of the worker's contract period. *Id.* § 655.202(b)(13). The section makes no reference to reimbursement of H-2B employees.

305. *Castellanos-Contreras*, 622 F.3d at 402–03 (citing *Arriaga*, 305 F.3d 1228 (11th Cir. 2002)).

306. *Id.* 403–04.

307. *Id.* at 404.

308. *Id.* at 403.

309. *Id.* at 404.

310. *Id.*

311. 622 F.3d 393.

312. *Rivera v. Peri & Sons Farms, Inc.*, 805 F. Supp. 2d 1042, 1047–48 (D. Nev. 2011).

313. *Id.* at 1048.

town.”<sup>314</sup> For example, the court noted that “[i]f a worker from Ohio desires to work in Nevada, he has to pay his own way to the state, and any reimbursement for that travel would be a gratuity.”<sup>315</sup> Consequently, the court inferred that the travel expenses incurred by an employee to begin work in the first instance are not covered under the FLSA, and therefore concluded that *Arriaga* was wrongly decided.<sup>316</sup>

*B. Interpretations of the FLSA Favoring Reimbursement of an H-2B Employee’s Pre-employment Expenses*

1. DOL Guidance

*a. Field Assistance Bulletin 2009-2*

On August 21, 2009, after the Fifth Circuit’s initial holding in *Castellanos-Contreras*<sup>317</sup> but prior to the case’s en banc rehearing,<sup>318</sup> the DOL published Field Assistance Bulletin No. 2009-2 to address the FLSA’s requirements in the context of the H-2B program.<sup>319</sup> In the Bulletin, the DOL expressly disagreed with the Fifth Circuit’s decision, and declared that “under the FLSA . . . the transportation expenses and visa fees of H-2B employees are primarily for the benefit of the employer.”<sup>320</sup> The Bulletin therefore prohibited employers from shifting the cost of these items to employees if doing so would lower their wages below the statutory minimum in the first week of employment.<sup>321</sup>

Addressing the arguments put forth in the 2008 Rule, the DOL first noted that the rule inaccurately characterized the employee’s immigration and travel expenses as “relocation costs,” which suggested that they were related to permanent employment.<sup>322</sup> Moreover, the DOL observed that the rule’s emphasis on employee willingness to pay their own travel and visa costs was misplaced.<sup>323</sup> Employees have long been willing to waive their rights under the FLSA, but this practice is strictly prohibited since it would defeat the purposes of the Act.<sup>324</sup> Consequently, the DOL asserted, the employees’ willingness to incur these fees does not establish that the employees are the primary beneficiaries of these expenses.<sup>325</sup>

The Bulletin acknowledged that the employee’s pre-employment expenses have value to both the employer and employee.<sup>326</sup> Faced with

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314. *Id.* at \*5.

315. *Id.*

316. *Id.*

317. 576 F.3d 274 (5th Cir. 2009), *aff’d en banc*, 622 F.3d 393 (5th Cir. 2010).

318. 622 F.3d 393.

319. FAB 2009-2, *supra* note 22.

320. *Id.* at 1.

321. *Id.* at 1.

322. *Id.* at 7.

323. *Id.* at 11.

324. *Id.*

325. *Id.*

326. *Id.* at 3.

strong arguments on both sides, the DOL relied on a number of its opinion letters issued since 1960, which consistently declared that these costs “must be borne by the employer, as a cost incidental to the employer’s recruitment program.”<sup>327</sup> The DOL conceded, however, that it had backed off this position in 1994 when it announced, “pending resolution of the policy and procedural issues relating to the treatment of transportation expenses, we are not prepared to assert violations in this area under the FLSA.”<sup>328</sup> Nevertheless, two years later, the DOL reaffirmed that “worker-incurred transportation costs from the point of remote hire to the worksite are primarily for the benefit of the employer,” but repeated its non-enforcement policy pending further review.<sup>329</sup>

The DOL next relied on the Eleventh Circuit’s reasoning in *Arriaga*, and endorsed its application to the H-2B program.<sup>330</sup> Specifically, it echoed the opinion that “travel and visa costs ‘are an inevitable and inescapable consequence’ of having foreign workers employed in the United States, and these costs arise out of the employment of such workers.”<sup>331</sup> Therefore, the Bulletin concluded that travel and visa expenses should be viewed as “incident of and necessary to the employment” and thus primarily for the benefit of the employer, since they are not ordinary living expenses and do not have value independent of the job performed.<sup>332</sup>

Notwithstanding this finding, the Bulletin still addressed the relative value of these expenses to the employer and employee.<sup>333</sup> Applying a primary benefit analysis, the DOL emphasized the rigorous recruitment procedures employers must satisfy to become eligible for the program.<sup>334</sup> The DOL reasoned that “[t]he employers’ choice to utilize this process, and their attestation that they are unable to find qualified and available U.S. workers, is evidence of their specific need for, and benefit from, those foreign workers.”<sup>335</sup> As opposed to the employers’ greater-than-normal benefit from these expenses, H-2B employees receive a reduced benefit due to the temporary nature of their employment.<sup>336</sup> The Bulletin notes that the employees have no option to remain in the United States, are hampered in their ability to obtain work from other U.S. employers, and are unable to participate in their community due to language barriers.<sup>337</sup> Accordingly,

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327. *Id.* (citing Opinion Letter from Wage & Hour Div., Dep’t of Labor (June 27, 1990), 1990 WL 712744; Opinion Letter from Wage & Hour Div., Dep’t of Labor (Nov. 10, 1970), 1970 WL 26461). These same letters were rejected by the *Arriaga* court as being conclusory and devoid of reasoning. See *Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228, 1238–39 (11th Cir. 2002); see also *supra* notes 230–32 and accompanying text.

328. See FAB 2009-2, *supra* note 22, at 3.

329. See *id.* at 4.

330. *Id.* at 4–5, 9.

331. *Id.* at 9 (quoting *Arriaga*, 305 F.3d at 1242, 1244).

332. *Id.* at 9–10.

333. *Id.* at 7.

334. *Id.* at 9.

335. *Id.* at 8.

336. *Id.* at 10.

337. *Id.*

the Bulletin concluded that the benefits to the H-2B employer outweighed the benefits to the employee.<sup>338</sup>

Similarly, in regard to recruitment fees, the DOL reasoned that the employer is the primary beneficiary of these expenses and therefore should be responsible for their payment.<sup>339</sup> Addressing the issue of passport-related costs, however, the Bulletin declared that these expenses primarily benefit the employee because she is able to use the passport for purposes other than employment.<sup>340</sup>

*b. The 2012 Rule and the H-2B Visa's New Regulatory Scheme*

The stated purpose for the DOL's recent shift in policy was to overhaul the attestation-based model for employer certification because it had failed to provide an adequate level of protection for both domestic and foreign workers.<sup>341</sup> Specifically, the DOL's new H-2B regulations are intended to "ensure access to jobs for U.S. workers" and to "ensure protection of workers in H-2B occupations who constitute a particularly vulnerable subgroup of the workforce."<sup>342</sup> To that end, the DOL instituted a number of changes to the H-2B program that are consistent with the DOL's interpretation of the FLSA as set forth in the Bulletin.<sup>343</sup> These rule changes were finalized on February 21, 2012, and are scheduled to go into effect in April of this year.<sup>344</sup>

Reiterating the reasoning contained in the Bulletin and *Arriaga*, the 2012 Rule declares that an H-2B employee's pre-employment expenses are primarily for the benefit of her employer, and that the H-2B employer must therefore reimburse such expenses in the first workweek, to the level necessary to meet the FLSA minimum wage.<sup>345</sup> For instance, the rule notes that these expenses "are an inevitable and inescapable consequence of employers choosing to participate in [the H-2B program]"; "are not ordinary living expenses"; "do not ordinarily arise in an employment relationship"; and are "just like any other tool of the trade." Nevertheless, the DOL concedes that it is bound by *Castellanos-Contreras* in jurisdictions within the Fifth Circuit.<sup>346</sup>

Unlike the Bulletin interpretation, the 2012 Rule would impose obligations on H-2B employers independent of the FLSA that prohibit

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338. *Id.* at 12.

339. *Id.*

340. *Id.*

341. Temporary Non-agricultural Employment of H-2B Aliens in the United States, 76 Fed. Reg. 15,130, 15,132 (proposed Mar. 18, 2011) (to be codified at 20 C.F.R. pt. 655).

342. *Id.* at 15,132, 15,133.

343. Temporary Non-agricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. 10,038, 10,077 (Feb. 21, 2012) ("The Department continues to believe that under the FLSA the transportation, subsistence, and visa and related expenses for H-2B workers are for the primary benefit of employers, as the Department explained in Wage and Hour's Field Assistance Bulletin No. 2009-2.").

344. *Id.* at 10,038.

345. *Id.* at 10,077-78.

346. *Id.* at 10,078.

employers from recouping any of the employee's pre-employment expenses—whether or not they reduce the employee's wages below the statutory minimum.<sup>347</sup> Moreover, “because U.S. workers are entitled to receive at least the same terms and conditions of employment as H-2B workers . . . the Final Rule requires the same reimbursement for U.S. workers in corresponding employment who are unable to return to their residence each workday.”<sup>348</sup>

Consequently, the requirements of the 2012 Rule are much broader than those imposed by *Arriaga*. Whereas the *Arriaga* decision would prohibit deductions below the minimum wage, the proposed rule would prohibit deductions below the offered wage.<sup>349</sup> The rule notes that “[t]his regulatory requirement . . . ensures the integrity of the full H-2B required wage, rather than just the FLSA minimum wage, over the full term of employment; both H-2B workers and U.S. workers in corresponding employment will receive the H-2B required wage they were promised.”<sup>350</sup>

The DOL had stated that these specific policies were only expected to shift \$51 million in expenses to H-2B employers and thus did not rise to the level of an economically significant regulatory action.<sup>351</sup> In the 2012 Rule, however, the DOL indicates that these expenses are now expected to shift over \$75 million to H-2B employers.<sup>352</sup> Other estimates suggest that the DOL's new calculation still grossly understates the actual cost to employers.<sup>353</sup>

## 2. Judicial Interpretation Finding that Reimbursement of an H-2B Employee's Pre-employment Expenses Is Required Under the FLSA

### a. *Castellanos-Contreras v. Decatur Hotels (Dissenting Opinion)*

The dissent in *Castellanos-Contreras* was highly critical of what it called the majority's “eccentric interpretation” of the FLSA and DOL regulations.<sup>354</sup> Specifically, the dissent took issue with the majority's

347. *Id.*

348. *Id.* at 10,077.

349. *Id.* at 10,078.

350. *Id.*

351. Temporary Non-agricultural Employment of H-2B Aliens in the United States, 76 Fed. Reg. 15,130, 15,162–63 (proposed Mar. 18, 2011) (approximating transportation expenditures at \$37.8 million, subsistence payments at \$1.5 million, and visa-related fees at \$11.7 million).

352. Temporary Non-agricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. at 10,023–27 (approximating transportation expenditures at \$61.3 million, subsistence payments at \$2.8 million, lodging at \$1.5 million, and visa-related fees at \$10.1 million).

353. See Prasad, *supra* note 40, at 818–19 (“[Pre-employment expenses] have been reported to range anywhere from \$3,000 to more than \$20,000.”). Applying the lower \$3,000 figure to the 66,000 visa cap produces a total cost to seasonal businesses of \$198 million—almost three times the DOL's projected cost. Of course, this calculation presumes pre-2009 participation levels. See *supra* notes 161–63 and accompanying text.

354. See *Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393, 404 (5th Cir. 2010) (en banc) (Dennis, J., dissenting).

refusal to give appropriate deference to the DOL's interpretation of its own rules.<sup>355</sup> As a result, the dissent argued that the majority unreasonably inferred from the absence of any express provision requiring reimbursement in the FLSA or DOL regulations that no such requirement exists.<sup>356</sup> The dissent noted that "[w]hen an agency fills [an explicit or implicit statutory] gap reasonably, and in accordance with other applicable (e.g., procedural) requirements, the courts must accept the result as legally binding."<sup>357</sup> Here, the dissent offered as support several DOL opinion letters declaring that an employer is liable for worker-incurred transportation costs for remotely hired employees.<sup>358</sup> The majority's failure to defer to the DOL's prevailing interpretation "supplants it with the withdrawn 98 day aberrant interpretation that has no relevance to this case."<sup>359</sup>

According to the dissent, the majority's analysis failed to appreciate that the FLSA is a distinct statutory scheme designed to protect workers from substandard wages and working conditions.<sup>360</sup> Citing *Arriaga*, the dissent noted that where the H-2B regulations overlap with the FLSA, the court must apply the provisions of both unless the regulations are mutually exclusive.<sup>361</sup> Here, the dissent noted there had been no showing that it is impossible to comply with both regulations.<sup>362</sup> Consequently, the dissent concluded the court's focus on the differing regulations governing H-2A and H-2B employers was misplaced.<sup>363</sup>

Although the *Arriaga* court likewise refused to defer to the DOL's interpretations (choosing instead to perform a plain language analysis), the dissent noted that the Eleventh Circuit's interpretation of the FLSA regulations resulted in the same conclusion.<sup>364</sup> Performing this analysis, the Eleventh Circuit observed that a "'line is drawn' between expenses that are for the benefit of the employer and those that can be charged to the employee 'based on whether the employment-related cost[s] [are] a personal expense that would arise as a normal living expense.'"<sup>365</sup> Like the Eleventh Circuit, the dissent endorsed the view that because the transportation and visa costs are an incident of and necessary to the employment and would not arise from "normal living," they must be borne by the employer.<sup>366</sup> Although the majority dismissed the reasoning in

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355. *Id.* at 409.

356. *Id.* at 416.

357. *Id.* at 415 (quoting *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 165 (2007)).

358. *Id.* at 409–10 (citing Opinion Letter from Wage & Hour Div., Dep't of Labor (May 10, 1996); Opinion Letter from Wage & Hour Div., Dep't of Labor (Nov. 28, 1986); Opinion Letter from Wage & Hour Div., Dep't of Labor (Sept. 26, 1977); Opinion Letter from Wage & Hour Div., Dep't of Labor (May 11, 1960)).

359. *Id.* at 418.

360. *Id.* at 416 (quoting 29 U.S.C. § 202 (2006)).

361. *Id.* (citing *Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228, 1235 (11th Cir. 2002)).

362. *Id.*

363. *Id.* at 420.

364. *Id.* at 418–19 (citing *Arriaga*, 305 F.3d 1228).

365. *Id.* at 419 (quoting *Arriaga*, 305 F.3d at 1243) (alterations in original).

366. *Id.* at 419.

*Arriaga* as only applicable to the H-2A program, the dissent observed “no reasoned basis on which to distinguish between H-2A and H-2B workers.”<sup>367</sup> Accordingly, the dissent concluded that “*Arriaga* should be recognized as pertinent precedent and the majority opinion should be understood as creating a circuit split without justification.”<sup>368</sup>

*b. District Court Cases*

Several district courts have adopted the Eleventh Circuit’s reasoning in *Arriaga* and the dissent’s reasoning in *Castellanos-Contreras* to conclude that an H-2B employee’s pre-employment expenses are the responsibility of her employer. For example, in 2011, the United States District Court for the Western District of New York, persuaded by the reasoning of *Arriaga*, Bulletin 2009-2, and the dissent in *Castellanos-Contreras*, concluded that “visa and transportation costs of H-2B employees are unique costs of doing business, primarily benefiting employers, which cannot be passed on to employees either directly or indirectly, if doing so would reduce the employees’ wages below minimum wage.”<sup>369</sup> The court noted that the Bulletin was thorough, well-reasoned, and consistent with the DOL’s previous interpretations of the FLSA.<sup>370</sup> Therefore, pursuant to *Skidmore*, the court gave substantial deference to the Bulletin in reaching its holding.<sup>371</sup>

Similarly, in 2008, the Northern District of Georgia found that *Arriaga* is highly persuasive precedent for the proposition that an H-2B employee’s travel and visa costs are for the primary benefit and convenience of the employer.<sup>372</sup> The court noted that an employer’s FLSA obligations exist independent of the H-2B regulations and thus the employer would be required to reimburse expenses found to be primarily for its benefit.<sup>373</sup> In finding that the expenses in question were indeed primarily for the benefit of the employer, the court noted that an H-2B employer is aware that its employees will necessarily incur these costs to participate in the H-2B program since they are an incident of the employment.<sup>374</sup> Furthermore, the court observed that H-2B workers are admissible only because their employer faces a shortage of domestic labor, and therefore these expenses are essential for the employer to meet its labor needs.<sup>375</sup>

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367. *Id.* at 419–20.

368. *Id.* at 420.

369. *Teoba v. Trugreen Landcare LLC*, 769 F. Supp. 2d 175, 185 (W.D.N.Y. 2011).

370. *Id.*

371. *Id.* (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). One month later, the Western District of New York reaffirmed this interpretation of the FLSA in the context of the H-2A program. *See Salazar-Martinez v. Fowler Bros., Inc.*, 781 F. Supp. 2d 183, 198 (W.D.N.Y. 2011).

372. *See De Leon-Granados v. Eller & Sons Trees, Inc.*, 581 F. Supp. 2d 1295, 1309 (N.D. Ga. 2008).

373. *Id.* at 1309–10.

374. *Id.* at 1311.

375. *Id.*

Likewise, in 2011, the Eastern District of North Carolina applied *Arriaga* to the H-2B program to conclude that an H-2B employee's transportation and visa costs are an incident of and necessary to the employment and are therefore primarily for the benefit of the employer.<sup>376</sup> Accordingly, the court held that these "costs cannot be the subject of a deduction, either actual or de facto, that reduces a worker's wage below federal minimum wage."<sup>377</sup> Nevertheless, another court in the Eastern District has held that although the FLSA obligates H-2B employers to reimburse guestworkers for their transportation expenses, employers are not liable for their employees' passport and visa fees.<sup>378</sup> In reaching this conclusion, the court noted that the regulations governing the H-2B program "speak directly to the issue of passport and visa expenses," and declare that they are the responsibility of the worker.<sup>379</sup>

### III. COMBINING THE FIFTH CIRCUIT'S INTERPRETATION OF THE FLSA WITH A FREE-MARKET APPROACH TO H-2B EMPLOYEE BENEFITS AND PROTECTIONS

Part II examined the major arguments put forth by the courts and the DOL in deciding whether the FLSA requires reimbursement of an H-2B employee's pre-employment expenses. While the weight of the case law and the DOL's interpretive guidance offer strong support that an H-2 employee's pre-employment expenses are primarily for the benefit of the employer, a number of factors counsel hesitation before future courts apply this interpretation to the H-2B program. Part III.A argues that the legislative history surrounding the H-2 program suggests that the DOL is improperly imposing obligations on non-agricultural employers that Congress intended to limit to agricultural employers only. Part III.B performs a "balancing of the benefits" analysis and concludes that an H-2B employee's expenses are not primarily for the benefit of the employer under the FLSA. Finally, Part III.C examines the policy considerations that should guide the resolution of this issue, and argues that visa portability, not government-mandated reimbursement of these expenses, is the proper way to protect H-2B employees from exploitation.

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376. *See* *Gaxiola v. Williams Seafood of Arapahoe, Inc.*, 776 F. Supp. 2d 117, 126–27 (E.D.N.C. 2011).

377. *Id.*

378. *Garcia v. Frog Island Seafood, Inc.*, 644 F. Supp. 2d 696, 706–07 (E.D.N.C. 2009).

379. *Id.* at 707.

A. *The Legislative History of the H-2B Program Suggests that the 2012 Rule Improperly Imposes Unnecessary Obligations on H-2B Employers*

1. Initial Division of the H-2 Program

The dissent in *Castellanos-Contreras* erroneously observed “no reasoned basis on which to distinguish between H-2A and H-2B workers.”<sup>380</sup> Congress divided the H-2 visa into the H-2A and H-2B visa programs in response to calls for improved labor conditions for migrant farm workers.<sup>381</sup> Congress determined that, in the context of agricultural occupations, the existing program did not adequately promote the purposes of the H-2 visa.<sup>382</sup> In implementing the H-2B visa, however, Congress concluded that the existing program worked “reasonably well” and explicitly declared that no changes were being made to the statutory framework governing non-agricultural occupations.<sup>383</sup> It is possible, therefore, that the DOL has exceeded its statutory authority under IRCA by imposing many of the H-2A requirements on non-agricultural employers.

Of course, if Congress were to conclude that the program’s existing framework inadequately advanced the objectives of the H-2B program, as it did with the H-2A visa, then certain changes may be necessary. Recent attempts to address the perceived inadequacies of the program, however, have garnered little support in Congress.<sup>384</sup> Furthermore, an independent investigation by the GAO concluded that H-2B employees enjoyed adequate working conditions, which suggests that such reform may not be necessary.<sup>385</sup> Until Congress determines that the H-2B program is actually in need of reform, both the courts and the DOL should refrain from imposing such costly obligations on H-2B employers.

2. FLSA Implications

The legislative history further suggests that neither Congress nor the DOL believed that the FLSA required reimbursement of these expenses at the time the H-2 program was divided. Contained in the revised statutory framework governing the H-2A program is a requirement that agricultural employers reimburse H-2A workers for travel expenses once they complete 50 percent of their work season.<sup>386</sup> Prior to the 2012 Rule, no such requirement was included in the regulations covering H-2B employers, yet both programs are covered by the FLSA.<sup>387</sup> Consequently, if non-payment of these expenses were an FLSA violation as asserted by the current DOL,

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380. *See Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393, 420 (5th Cir. 2010) (en banc) (Dennis, J., dissenting); *see also supra* notes 367–68 and accompanying text.

381. *See supra* notes 32–38 and accompanying text.

382. *See supra* notes 36–37 and accompanying text.

383. *See supra* notes 32–38 and accompanying text.

384. *See supra* notes 39–42 and accompanying text.

385. *See supra* notes 129–36 and accompanying text.

386. *See supra* notes 78–84 and accompanying text.

387. *See supra* notes 80–88 and accompanying text.

delaying reimbursement of transportation expenses for H-2A employees would have limited the protections available to these workers. This outcome clearly would have been inconsistent with the congressional intent of IRCA—to enhance the protections for migrant farm workers.<sup>388</sup>

Similarly, the regulations governing both programs expressly disclaim any prohibition on an employer receiving reimbursement for passport and visa fees, and further classify these expenses as “the responsibility of the worker.”<sup>389</sup> Again, had the FLSA required reimbursement of these expenses, this provision would have been inconsistent with Congress’s intent to improve labor conditions of migrant farm workers.

The congressional history of the FLSA also opposes the changes contained in the 2012 Rule. The provisions of the FLSA governing payment of wages in “facilities” were intended to frustrate employers’ attempts to circumvent the minimum wage provisions of the Act by charging their employees excessive fees for such facilities.<sup>390</sup> The FLSA was not intended to limit the ability of the employer and employee to agree on reasonable deductions for expenses that enable the employee to participate in the workforce.

### 3. Administrative Law Implications

One of the primary purposes of the H-2B program is to protect the jobs of domestic employees.<sup>391</sup> Hiring H-2B workers when U.S. workers are unavailable enables H-2B employers to expand production and thereby offer additional higher-skilled jobs to domestic workers. Taking the findings of the USCOC, the University of Maryland, and Senators Miluski, Jeffords, and Collins as true—that the H-2B program helps support domestic employment—then any policy tending to inhibit employers’ use of the program would violate the program’s legislative intent to protect the jobs of American citizens.<sup>392</sup>

When assessing whether an administrative agency’s interpretation of an ambiguous statute is reasonable, a court will consider the congressional purpose underlying the statute, the statute’s legislative history, congressional action or inaction regarding the interpretation, and the time between the interpretation and the enactment being construed.<sup>393</sup> All of these factors tend to diminish the level of deference owed to the 2012 Rule: the congressional purpose and legislative history of IRCA and the FLSA are irreconcilable with the DOL’s rule changes; Congress has been made aware of the alleged inadequacies of the program, yet recent attempts to legislate increased worker protection have failed; and twenty-six years have passed between the establishment of the H-2B program and the DOL’s new interpretation.

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388. *See supra* notes 36–38 and accompanying text.

389. *See supra* note 86 and accompanying text.

390. *See supra* notes 184–87, 200–01 and accompanying text.

391. *See supra* notes 97–102 and accompanying text.

392. *See supra* notes 97–102, 125–28 and accompanying text.

393. *See supra* notes 203–18 and accompanying text.

Courts will also consider the consistency of the disputed interpretation in assessing its reasonableness, and an agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference.<sup>394</sup> It is apparent that the 2008 Rule was intended to be a clarification of existing DOL policy when it declared that "[t]he Department will continue to permit employers, consistent with the Fair Labor Standards Act (FLSA), to make deductions from a worker's pay for the reasonable cost of furnishing housing and transportation, as well as worker expenses such as passport and visa fees."<sup>395</sup> The subsequent withdrawal of this interpretation on March 26, 2009 came only one month after President Obama appointed a new Secretary of Labor, which suggests that the withdrawal may have been based on a change in political beliefs.<sup>396</sup> Because of the DOL's inconsistency and the factors listed above, courts should pause before deferring to the DOL's new regulations.

*B. An H-2B Employee's Pre-employment Expenses Are Not Primarily for the Benefit of the Employer*

1. These Expenses Are Not an Incident of and Necessary to the Employment

The FLSA regulations provide that transportation that is "incident of and necessary to the employment" is primarily for the benefit of the employer, and therefore may not be deducted from an employee's wage.<sup>397</sup> As the *Arriaga* court explained, "incident" means "'dependent on, subordinate to, arising out of,'"<sup>398</sup> while "necessary" is defined as "'of an inevitable nature: inescapable.'"<sup>399</sup> The *Arriaga* decision undertakes an exhaustive analysis of whether the expenses are incident and necessary. The court does not, however, analyze what is meant by the term "employment."

This Note argues that the expenses at issue arise not from the "employment" as the term is intended by the FLSA, but from the parties' pre-employment circumstances. According to the FLSA, "'employ' [means] to suffer or permit to work."<sup>400</sup> Transportation and visa expenses associated with arriving at a new job are necessarily incurred prior to being permitted to work. In fact, both Bulletin 2009-2 and *Arriaga* appropriately

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394. See *supra* notes 217–18 and accompanying text.

395. See *supra* notes 247–48 and accompanying text.

396. See *Meet Secretary of Labor Hilda L. Solis*, U.S. DEP'T OF LABOR, [http://www.dol.gov/\\_sec/welcome.htm](http://www.dol.gov/_sec/welcome.htm) (last visited Feb. 23, 2012) (Secretary Solis was confirmed on February 24, 2009). Perhaps equally noteworthy, the Fifth Circuit, which has been ridiculed for its refusal to apply *Arriaga* to the H-2B program, includes Texas and Louisiana, two states with the highest usage of the program. See H-2 Statistics 2006–2009, *supra* note 148.

397. See *supra* notes 188–91 and accompanying text.

398. *Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228, 1242 (11th Cir. 2002) (quoting BLACK'S LAW DICTIONARY 765 (7th ed. 1999)).

399. *Id.* (quoting MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 776 (10th ed. 1995)).

400. 29 U.S.C. § 203(g) (2006).

classify these costs as “pre-employment expenses.”<sup>401</sup> Employment entails the “association between a person employed to perform services in the affairs of another, who in turn has the right to control the person’s physical conduct in the course of that service.”<sup>402</sup> Until the worker arrives at the worksite, she is under no obligation and is subject to no control of the employer, and therefore no “employment” relationship exists from which any compensable expenses may arise.<sup>403</sup>

Furthermore, the phrase “incident to employment” has its own independent legal definition. In the context of workers’ compensation, *Black’s Law Dictionary* defines the phrase as “related to or connected with a worker’s job duties.”<sup>404</sup> Applying this definition, an H-2B worker’s travel, visa, and recruitment expenses can never qualify because they are always incurred prior the imposition of any “job duties.” The DOL advanced a similar position in the 2008 Rule, which stated that for an expense to be an incident of and necessary to the employment, it “must have a more direct and palpable connection to the job in question than merely serving to bring the employee to the work site.”<sup>405</sup>

The examples of “necessary” and “incident” facilities included in the FLSA regulations provide ample support for this analysis. The regulations cite the transportation charges incurred by railroad maintenance workers, travel expenses associated with business trips, and the cost of relocating after an employer moves its business, as expenses that are incident of and necessary to the employment.<sup>406</sup> All of these expenses are related to the performance of a worker’s particular job duties after she begins her job, and therefore after the worker may be properly described as “employed.” Similarly, uniforms, safety equipment, and employee security are all costs incurred once the worker has begun her employment.<sup>407</sup> These expenses are all subject to the discretion of the employer and are connected with the worker’s job duties. When an employer orders an employee to purchase a uniform, for example, the employee incurs this expense subject to the direction and control of the employer and for the purpose of performing her specific job responsibilities. On the other hand, when an H-2B employer recruits a foreign worker, the worker is not subject to the control of the employer until she arrives at the worksite. After accepting the H-2B position, the worker merely does what is necessary under the law to gain entry to the United States to begin her employment. In this regard, the

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401. See FAB 2009-2, *supra* note 22, at 3 (“If an employee incurs pre-employment expenses that are primarily for the benefit of the employer, they are considered *de facto* deductions from the employee’s wages . . . .”); *Arriaga*, 305 F.3d at 1237 (“Workers must be reimbursed during the first workweek for pre-employment expenses which primarily benefit the employer . . . .”).

402. BLACK’S LAW DICTIONARY 1402 (9th ed. 2009).

403. See, e.g., *Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393, 403–04 (5th Cir. 2010) (en banc) (noting that the H-2B employer imposes no requirements on its workers prior to their arrival at the job site).

404. BLACK’S LAW DICTIONARY, *supra* note 402, at 830.

405. See *supra* notes 264–67 and accompanying text.

406. See *supra* notes 194–95 and accompanying text.

407. See *supra* note 194 and accompanying text.

expenses may be said to arise out of the recruitment of foreign workers, as described in the *Castellanos-Contreras* dissent.<sup>408</sup> But the regulations pertain to employment; they do not require reimbursement of recruitment expenses.

Moreover, a finding that an H-2B employee's pre-employment expenses are incident of and necessary to employment such that they must be reimbursed under the FLSA would have ramifications extending beyond the context of the H-2B program. Although it might be customary for some employers to reimburse pre-employment costs when they recruit non-local employees, the practice is far from universal. For instance, even the House of Representatives declines reimbursement of similar expenses: "Transportation and all related travel expenses associated with the interview and hiring process must be paid by the applicant. Moving and related relocation expenses are not available."<sup>409</sup> If the pre-employment expenses at issue were truly an incident of and necessary to the employment, Congress's own employment policies would violate the FLSA.

## 2. An H-2B Employee's Pre-employment Expenses Arise in the Course of Ordinary Life

In concluding that an H-2B worker's pre-employment expenses do not qualify as "other facilities," which may be included in an employee's wage, both Bulletin 2009-2 and the dissenting opinion in *Castellanos-Contreras* rely on the Eleventh Circuit's reasoning in *Arriaga* that only those expenses "that would arise in the course of ordinary life" may qualify as "other facilities."<sup>410</sup> As support, the *Arriaga* court notes that examples provided in the regulation of facilities "that 'primarily benefit the employee' are universally ordinary living expenses that one would incur in the course of life outside the workplace."<sup>411</sup> The "other facilities" listed include meals, housing, and "transportation . . . where the travel time does not constitute hours worked compensable under the Act and the transportation is not an incident of and necessary to the employment."<sup>412</sup> Although transportation is specifically listed as an expense that may qualify, the court concluded that the expense cited in the regulations refers only to daily commuting costs.<sup>413</sup>

First, it should be noted that the court is wrong in classifying the expenses listed in the regulation as "primarily for the benefit of the employee" merely because they qualify as deductible expenses. Neither the

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408. *Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393, 404 (5th Cir. 2010) (en banc) (Dennis, J., dissenting).

409. *Employment Information*, U.S. HOUSE OF REPS., <http://www.house.gov/content/jobs/> (last visited Feb. 23, 2012); see also Brief of Amici Curiae at 24–25, *Castellanos-Contreras v. Decatur Hotels, LLC*, 576 F.3d 274 (5th Cir. 2009) (No. 07-30942). The Congressional Accountability Act of 1995 made the FLSA applicable to employees of the legislative branch of the federal government. 2 U.S.C. § 1302 (2006).

410. *Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228, 1242 (11th Cir. 2002).

411. *Id.* at 1242–43.

412. 29 C.F.R. § 531.32(a) (2011).

413. *Arriaga*, 305 F.3d at 1242.

FLSA nor the DOL regulations specify that qualifying “other facilities” must primarily benefit the employee. Rather, the only qualification is that they not be “primarily for the benefit or convenience of the employer.”<sup>414</sup> Therefore, an expense that provides an equal benefit to the employer and employee may qualify as an “other facility” deductible from the employee’s wage, since it is not “primarily for the benefit and convenience of the employer.”

Furthermore, as noted in the preamble to the 2008 Rule, “the regulation does not distinguish between commuting and relocation costs, and in the context of the H-2B program, inbound relocation costs fit well within the definition as they are between the employee’s home country and the place of work.”<sup>415</sup> Therefore, the court in *Arriaga* makes an unjustified assumption that transportation expenses, other than daily commuting expenses, may not be included in wages merely because such expenses are not “ordinary.” Nevertheless, assuming that the court is correct in finding that “other facilities” may only include ordinary living expenses, the court erroneously concludes that an H-2B worker’s pre-employment expenses do not qualify.

The *Arriaga* court observed that costs associated with commuting to and from work are indeed “expenses that arise in the ordinary course of life.” These daily commuting costs arise in the ordinary course of life because they must be incurred in order for most individuals to seek and obtain gainful employment. Obtaining and maintaining gainful employment is an objective of all working individuals; it seems reasonable to assume, therefore, that all costs associated with achieving gainful employment are ordinary living expenses. Of course, the court ultimately concludes that an H-2B worker’s pre-employment expenses, specifically long-distance transportation expenses, are extraordinary and by implication are not ordinarily associated with seeking gainful employment.<sup>416</sup>

The court’s conclusion fails to consider the economic realities that most H-2B workers face in their native countries. In the United States, where most employment opportunities are relatively fungible from state to state, it might be fair to conclude that expenses incurred to obtain a job outside of one’s immediate vicinity are not ordinarily incurred in the typical job search. In a country like Mexico, however, where 44.2 percent of the population lives in poverty, it is reasonable to assume that many Mexican citizens must often travel substantial distances and incur great expense to obtain gainful employment in the United States.<sup>417</sup> For example, the town

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414. See 29 C.F.R. § 531.3(d)(1) (“The cost of furnishing ‘facilities’ found by the Administrator to be primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages.”).

415. Labor Certification Process and Enforcement for Temporary Employment of H-2B Workers, 73 Fed. Reg. 78,020, 78,041 (Dec. 19, 2008) (withdrawn by 74 Fed. Reg. 13,261 (Mar. 26, 2009)).

416. See *Arriaga*, 305 F.3d at 1242–43.

417. Cf. Bill Ong Hing, *The Dark Side of Operation Gatekeeper*, 7 U.C. DAVIS J. INT’L L. & POL’Y 121, 147 (2001) (“The reality is that people desperate for work go where they can find work. . . . [Many Mexicans] travel hundreds of miles over several days from interior

of La Esperanza, Mexico has sent multiple generations of workers to the same U.S. employer for over a decade.<sup>418</sup> Without the H-2B program, these workers would struggle to support themselves. The expenses incurred when the workers choose to participate in the H-2B program are necessary for them to obtain gainful employment, and therefore should be considered “ordinary living expenses.”

An H-2B employee’s pre-employment expenses may be analogized to a college student’s pre-matriculation costs. Nobody would classify the temporary relocation costs of students traveling across state lines to attend college as an extraordinary expense. These costs arise in the ordinary course of life because educational opportunities vary tremendously from state to state. Likewise, the temporary relocation costs of H-2B employees are ordinary expenses that arise in the ordinary course of life for citizens of countries lacking access to economic opportunities.

### 3. Relative Benefit Analysis

Although the H-2B employer receives a substantial benefit from participating in the H-2B program, the relative benefit to the worker of gaining access to the U.S. labor market is equal to or exceeds the employer’s benefit.<sup>419</sup> Most H-2B workers come from severely impoverished countries with little access to any economic opportunity.<sup>420</sup> Within migrant-sending communities, there is often a great divide between the quality of life enjoyed by those who participate in the guestworker program and those who do not.<sup>421</sup> The H-2B program enables migrant workers to fashion their homes with modern appliances and furniture, while non-migrants’ homes often lack basic amenities such as indoor plumbing, personal telephones, and flooring.<sup>422</sup> Participating in the program is critical to the ability of many of these workers to support their families.<sup>423</sup> Consequently, H-2B workers are often willing to make substantial sacrifices, monetary and otherwise, to take advantage of these benefits.

Critics are correct in asserting that H-2B employers experience a greater than usual benefit because the program is often the only legal source of labor in the face of a domestic labor shortage.<sup>424</sup> This argument fails to note, however, that a corresponding shortage in economic opportunities in migrant-sending countries translates into a greater than usual benefit for employees. In the 2009 Bulletin, the DOL asserted that whatever benefit is enjoyed by employees is offset by the temporary nature of their

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sections of Mexico on their way to find jobs in cities throughout the U.S.” (internal quotation marks omitted)).

418. See Pickral, *supra* note 68, at 1028–29.

419. See *supra* notes 105–24 and accompanying text.

420. See *supra* notes 104–23 and accompanying text.

421. INT’L HUMAN RIGHTS LAW CLINIC, AM. UNIV. WASH. COLL. OF LAW & CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., *supra* note 12, at 11–12.

422. *Id.*

423. See *supra* notes 122–24 and accompanying text.

424. See *supra* notes 374–75 and accompanying text.

employment.<sup>425</sup> However, looking at data supplied by the Bureau of Labor Statistics, it appears that this argument was overstated. Statistics measuring the duration of employment relationships for citizens of Hispanic or Latino descent indicate that between 1998-2008, the majority of Hispanic and Latino workers aged thirty-two and under, which is the highest demographic of H-2B participants,<sup>426</sup> have not remained with any employer longer than one year.<sup>427</sup>

Though an H-2B employee does indeed enjoy a greater relative benefit than her employer by participating in the program, there are limits to what this requires of the employee. There is a fundamental difference between those expenses that are imposed by the employer that specifically relate to the employee's job duties, and those expenses that enable the worker to participate in the workforce generally. Expenses imposed on employees in the course of performing their job duties will almost always be primarily for the benefit of the employer. Conversely, expenses the employee incurs to obtain employment, such as transportation and visa costs, bear a much closer relationship to the benefits enjoyed by the employee and are therefore not primarily for the benefit of the employer.

### *C. Policy Reasons Favoring the Fifth Circuit's Interpretation of the FLSA*

#### 1. Effects on Domestic Employment

One of the primary purposes of the H-2B program is to protect the jobs of American citizens, yet by shifting more costs to the employer, fewer resources are available to employ U.S. workers. Faced with increased labor costs, an H-2B employer may choose to: (1) replace the guestworkers with American workers; (2) absorb the cost, continue hiring the guestworkers, and make cuts elsewhere; (3) hire cheap, illegal labor; or (4) forego hiring anybody.

The option that appears to produce the result most consistent with the objectives of the H-2B program—hiring more domestic workers—is actually the least feasible. The nature of the program necessarily requires an absence of willing and able domestic workers.<sup>428</sup> Of course, economics would dictate that if the employer raised the wages of the offered position, then more Americans might be willing to accept the job opportunity. Often, however, this is not the case. Despite an unemployment rate that has climbed close to 9 percent since 2009, many Americans are simply unwilling to do the work that H-2 workers do.<sup>429</sup> Recently in Colorado, for

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425. See *supra* notes 333–38 and accompanying text.

426. See *supra* note 147 and accompanying text.

427. See *Duration of Employment Relationship with a Single Employer for All Jobs by Hispanic or Latino Ethnicity*, BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, <http://www.bls.gov/news.release/nlsoy.t02.htm> (last visited Feb. 23, 2012).

428. See *supra* notes 60–67 and accompanying text.

429. See *supra* notes 105–06 and accompanying text; see also Tate Watkins, *While Alabama Cracks Down on Illegal Immigration, Department of Labor Threatens Legal*

example, an H-2A employer, believing that there would be an increase in domestic demand for employment, reduced its number of H-2A employees by a third.<sup>430</sup> But after only six hours of work, nearly all of the local workers quit because “the work was too hard,” even though they were being paid \$10.50 an hour (i.e., above minimum wage).<sup>431</sup> Still, assuming that an H-2B employer is able to sufficiently raise wages to attract local employees, the rising cost of labor would likely result in cuts elsewhere. Nevertheless, because most H-2B positions tend to be unskilled,<sup>432</sup> the marginal rate of utility for each additional worker may not justify the increased labor costs necessary to boost domestic participation.

## 2. Visa Portability Is the Appropriate Means to Prevent Exploitation of H-2B Employees

While amending H-2B regulations to better protect employees is a desirable goal, any such shift in policy should consider the impact on all interested parties. Currently, the DOL’s policy shift focuses on the immediate effects on a portion of H-2B employees while neglecting the long-term impact on other H-2B participants. Specifically, the change in policy benefits only those H-2B employees who may have otherwise agreed to cover their own pre-employment expenses. The policy fails to consider the potential impact on those H-2B employees who may go unhired as a result of the increased cost to employers. Consequently, such a policy will disproportionately impact the least skilled H-2B workers by increasing their relative cost of employment. The policy will also discourage employers from recruiting workers in countries with greater transportation costs, such as Jamaica and Guatemala.<sup>433</sup> Moreover, the policy fails to consider the long-term impact on domestic hiring; those businesses that rely on the H-2B program may be forced to scale back production.

Curbing employee abuse is obviously an admirable goal and one that should be promoted in any subsequent change to the DOL’s H-2B policies. However, rather than impose increased labor costs on H-2B employers, which inevitably produces unintended consequences, a more efficient approach would be to loosen the restrictions on H-2B visa portability to allow H-2B visa holders to switch employers in the event of labor violations. H-2B employees lack this fundamental protection that the free market otherwise affords to domestic employees and other visa holders,<sup>434</sup> and as a result, they may be susceptible to exploitation by unscrupulous employers.<sup>435</sup>

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*Variety*, REASON MAG. (Nov. 7, 2011), <http://reason.com/blog/2011/11/07/alabama-illegal-immigration-h-2b-visa-la>.

430. See Johnson, *supra* note 105, at A17.

431. See *id.*; see also *supra* notes 106–08 and accompanying text.

432. See *supra* note 148 and accompanying text.

433. See *supra* note 148 and accompanying text.

434. For example, it is much easier for H-1B visa holders to change employers if their first job does not work out. See Griffith, *supra* note 45, at 132.

435. See *supra* notes 129–46 and accompanying text.

Under the current system, once the H-2B employee arrives in the United States, she is subject to the immense power of her employer and has little recourse if her rights are violated. If hired by a predatory employer, she can either put up with continued mistreatment, or she can file a complaint against the employer under the FLSA and risk being deported to the impoverished economy in her home country.<sup>436</sup> This, the program's staunchest critics assert, is the most egregious shortcoming of the program's current regulatory scheme.<sup>437</sup> If, however, H-2B employees were empowered to change employers more easily, then they would be less discouraged from filing complaints against dishonest employers, and employers would be dissuaded from subjecting their employees to substandard labor conditions due to the risk of losing labor.

The 2012 Rule provides for an electronic job registry to disseminate available H-2B job opportunities to U.S. workers.<sup>438</sup> A similar mechanism can be used to match qualifying H-2B employers with available H-2B employees already within the United States. Such a procedure would provide a more speedy transition for the employee, while also reducing the recruitment costs of the employer.

It is true that the two protections, visa portability and reimbursement of the employee's pre-employment expenses, are not mutually exclusive. But combining these two policies would likely further deter participation in the program, which has already experienced a substantial decline in recent years.<sup>439</sup> Employers would reasonably be wary of outlaying substantial sums of money on recruitment and transportation of foreign workers if the worker were free to switch employers upon arrival. Furthermore, enhanced disclosure provisions could help reduce any disparity in bargaining power between employer and employee, and would reduce the likelihood of improper deductions.<sup>440</sup>

#### CONCLUSION

The DOL should adopt the Fifth Circuit's interpretation of the FLSA as it relates to the H-2B program. The pre-employment expenses of H-2B employees are not primarily for the benefit of their employer, and the DOL should not require reimbursement of these expenses absent a congressional finding that the H-2B program is in need of reform. Neither law nor policy support the new obligations imposed on H-2B employers in the 2012 Rule. The legislative history of the H-2B program and of the FLSA, as well as a balancing of the relative benefits enjoyed by H-2B participants, suggest that the DOL's shift in policy is unsound. Furthermore, increasing the labor costs of employers in the midst of a stagnant economy could have adverse effects on not only H-2B participants, but also domestic employees. Market

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436. *See supra* notes 129–46 and accompanying text.

437. *See supra* notes 144–46 and accompanying text.

438. *See supra* note 62 and accompanying text.

439. *See supra* notes 168–79 and accompanying text.

440. *See supra* note 272 and accompanying text.

forces, not the government, should therefore determine who bears these expenses.

Under the H-2B visa's current framework, an H-2B employee is restricted from changing employers for the duration of her employment. This has left some H-2B employees susceptible to exploitation and abuse, as employees are often hesitant to assert their rights and risk deportation. The DOL has amended the regulations governing the H-2B program to require reimbursement of an H-2B employee's pre-employment expenses, in part, to prevent the adverse effects a policy of non-reimbursement might have on these vulnerable workers. A more efficient and effective deterrent to employee abuse would be increased visa portability. Such a policy is unworkable, however, where employers are required to cover their employees' pre-employment expenses.