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The Framework for Foreign Workers' Labor Protections Under Federal Law

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Summary

One challenge of immigration law has been to balance the interests of the domestic workforce with employer interests in hiring foreign workers who are not already authorized to work in the United States while preventing the exploitation of foreign workers. There are three main sources of labor protections for foreign workers in the United States: (1) the conditions imposed on employers hiring foreign workers through the Department of Labor (DOL) labor certification/attestation and DHS petition process; (2) federal labor laws stipulating that employers adhere to certain requirements governing wages and other conditions; and (3) worker rights under state and local laws regarding labor, contracts, and torts.

Streamlining and easing certain labor and immigration requirements that are perceived as unnecessarily onerous and insufficiently flexible may benefit certain employers with immediate labor needs. On the other hand, stronger protections for foreign workers may not only guard those workers from exploitation and abuse but may also serve to protect the interests of the domestic workforce by reducing to some employers the attractiveness of hiring foreign workers who are not already authorized to work in the United States. Legislative proposals to reform employment-based visa programs in the current Congress reflect some of these tensions.

This report will discuss the DOL labor certification/attestation and Department of Homeland Security (DHS) petition process as well as aspects of the applicability of federal labor laws to foreign workers. It will also briefly address state and local laws regarding labor, contract, and torts that sometimes provide foreign workers with additional rights. Federal labor laws that apply regardless of immigration status, including those concerning health and safety and employment discrimination, as well as state occupational certification and licensing requirements are outside the scope of this report.

For a comprehensive look at employment-based immigration and related federal labor policies and programs, see CRS Report RL33977, *Immigration of Foreign Workers: Labor Market Tests and Protections*, by (name redacted); CRS Report RL32044, *Immigration: Policy Considerations Related to Guest Worker Programs*, by (name redacted); CRS Report R42434, *Immigration of Temporary Lower-Skilled Workers: Current Policy and Related Issues*, by (name redacted); CRS Report R43161, *Agricultural Guest Workers: Legislative Activity in the 113th Congress*, by (name redacted); CRS Report RL34739, *Temporary Farm Labor: The H-2A Program and the U.S. Department of Labor's Proposed Changes in the Adverse Effect Wage Rate (AEWR)*, by (name redacted); and CRS Report RS21186, *Hoffman Plastic Compounds v. NLRB and Backpay Awards to Undocumented Aliens*, by (name redacted).

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Introduction

Preventing the domestic workforce from being undermined by the employment of foreign workers and protecting foreign workers from exploitation have shaped federal law governing the hiring and employment of foreign workers by U.S. employers. In the United States, there are three main sources of labor protections for foreign workers: (1) the conditions imposed on employers hiring foreign workers through the DOL labor certification/attestation and DHS petition process; (2) federal labor laws stipulating that employers adhere to certain requirements governing wages and other conditions; and (3) private causes of action that foreign workers may have under state and local laws regarding labor, contracts, and torts.

With a view towards clarifying the framework for foreign workers protections under federal laws, this report will briefly survey current federal laws related to foreign workers' rights, including immigration-related labor conditions and federal labor laws. In addition, this report will take note of private causes of action that foreign workers may have under various state and local laws. Finally, this report will examine immigration-related legislative proposals S. 744, H.R. 2131, and H.R. 1773 pending before the 113th Congress.[1]

Federal Immigration Laws

Protections for foreign workers are generally provided pursuant to the Immigration and Nationality Act (INA)[2] and are strongest for nonimmigrant (i.e., temporary) workers in visa categories generally associated with lower-skilled occupations, such as H-2A agricultural workers and H-2B forestry/logging workers, since such workers are perceived as more vulnerable to exploitation and less likely to have sufficient resources to enforce their rights effectively. In particular, *nonimmigrant* foreign workers may find themselves subject to deportation in the event of a job loss. Foreign workers who are admitted into the United States as *immigrants* or adjusted to *lawful permanent resident status* come within the statutory definition of *United States worker* and are not vulnerable to losing their immigration status in the event of a job termination by a specific employer.[3]

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[1] This report does not discuss certain federal labor laws that apply to the workplace regardless of immigration status, including those concerning health and safety and employment discrimination, or state occupational certification and licensing requirements. For additional information on employment-based immigration and related federal labor policies and programs, see CRS Report RL33977, *Immigration of Foreign Workers: Labor Market Tests and Protections*, by (name redacted); CRS Report RL32044, *Immigration: Policy Considerations Related to Guest Worker Programs*, by (name redacted); CRS Report R42434,*Immigration of Temporary Lower-Skilled Workers: Current Policy and Related Issues*, by (name redacted); CRS Report R43161,*Agricultural Guest Workers: Legislative Activity in the 113th Congress*, by (name redacted); CRS Report RL34739,*Temporary Farm Labor: The H-2A Program and the U.S. Department of Labor's Proposed Changes in the Adverse Effect Wage Rate (AEWR)*, by (name redacted); and CRS Report RS21186, *Hoffman Plastic Compounds v. NLRB and Backpay Awards to Undocumented Aliens*, by (name r edacted) (pdf).

[2] INA §§203(b)(3)(C), 212(a)(5), (n), and (t), 214(c), 218, codified as amended at 8 U.S.C. §§1153(b)(3)(C), 1182(a)(5), (n) and (t), 1184(c), 1188, and related regulations at 20 C.F.R. parts 655 and 656 and 29 C.F.R. parts 501 and 503.

[3] *United States worker* is defined as including a U.S. citizen or national, a lawful permanent resident, a refugee/asylee, or other immigrant authorized to work (e.g., an alien in a temporary resident status under a legalization program of the 1986 Immigration Reform and Control Act (IRCA), P.L. 99-603, 100 Stat. 3359; *see* INA §212(n)(4) and (t)(4), codified as amended at 8 U.S.C. §1182(n)(4) and (t)(4), and related regulations at 20 C.F.R. parts 655 and 656 and 29 (continued...)

Employers who desire to hire foreign workers who are not already authorized to work in the United States, in either immigrant or nonimmigrant employment-based visa classes, must follow a two-step process. First, the employer must acquire from the DOL a labor certification or attestation that certain labor conditions required to hire foreign workers have been satisfied.[4] In the second step, the employer must petition the DHS for nonimmigrant workers and submit to DHS the DOL labor certification or attestation.[5]

Under the first step, the employer generally must show that there are not enough qualified U.S. workers available to meet the employer's needs and that the employment of foreign workers will not adversely affect the working conditions of U.S. workers. The former may be shown by the employer's recruitment efforts or by the DOL classifying the occupation as having a labor shortage.[6] Depending on the visa category, the latter may be shown by the employer adhering to certain wage requirements or job offer or contract content requirements. The labor conditions that must be satisfied are established by the INA and DOL regulations and differ according to the nonimmigrant worker or employment-based immigration classification.[7] Generally, temporary agricultural guest workers have received the strongest protections through explicit statutory provisions[8] that are implemented by DOL through its regulations.[9]

Under the two-step process, the DOL and the DHS have jurisdiction over the labor certification and the visa petition, respectively, and related enforcement responsibilities. Both agencies have authority to impose civil penalties on and/or debar employers who violate labor conditions for foreign workers, at either the labor certification/attestation stage or the worker petition stage. Debarment is notification to an employer who has substantially violated obligations under a nonimmigrant worker program that DOL and the DHS will not accept or will deny any labor certification applications and/or visa petitions submitted by the employer.[10] These agency actions are the sole avenue to enforce the labor condition requirements linked to certain employment-based immigrant or guest worker nonimmigrant programs. Individual workers do not have private causes of action under federal immigration laws against employers who violate conditions of the

(...continued)

C.F.R. parts 501 and 503.

[4] *Supra* note 2.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] Currently at INA §218, codified as amended at 8 U.S.C. §1188.

[9] *Supra* note 2. As of the date of this report, there are cases in two circuits challenging DOL's authority is promulgate the H-2B labor certification regulations that could lead to a circuit split. While INA §218 explicitly grants DOL the authority to regulate the H-2A labor certification program, INA §214(c) grants DHS the authority to regulate the H-2B program in consultation with DOL. DOL maintains that its regulation of H-2B labor certification is part of its consultative responsibilities and that Congress has implicitly granted DOL this authority since Congress has never amended the statute to legislate otherwise, despite DOL's long-standing regulation of H-2B labor certification. In Bayou Lawn & Landscape Servs. v. Oates, 713 F.3d 1080 (11th Cir. 2013), the appellate court upheld the district court's preliminary injunction against H-2B labor certification regulations promulgated by DOL in 2011, finding that the plaintiffs/appellees had shown a substantial likelihood of success on the merits and irreparable injury if the new rules were not enjoined. Plaintiffs/appellants in Louisiana Forestry Assoc. v. Sec., U.S. Dept. of Labor, No. 12-4030 (3rd Cir. filed Oct. 24, 2012), are appealing the district court holding that DOL has authority to promulgate the H-2B labor certification regulations.

[10] Debarment is different from a denial of a labor certification application or visa petition for reasons concerning that particular labor application or visa petition. Debarment is the blanket denial of all applications or petitions of a particular employer for a time period.

labor certification or attestation. However, as discussed below, such remedies may be available and constitute a significant enforcement mechanism under some federal labor laws and state labor, contract, or tort laws.

Responsible for administering and approving labor certification applications/attestations submitted by employers,[11] the DOL generally has authority over non-compliance with labor certifications. The Office of Foreign Labor Certification (OFLC) of the Employment and Training Administration (ETA) in the DOL administers the labor certification program, which includes processing certification applications and auditing certifications, for the various employment-based visas. The OFLC bases its non-compliance actions on investigations conducted by the Wage and Hour Division (WHD) in the Employment Standards Administration (ESA) of the DOL. The WHD is responsible for ensuring compliance with laws governing wages and working conditions, including the employment eligibility provisions of the Immigration and Nationality Act (INA) as well as labor standards laws,[12] and for investigating violations of such laws.[13] The Office of the Inspector General (OIG) within the DOL, which is responsible for investigating fraud in DOL programs,[14] may become involved in alleged labor certifications/attestation violations if there is an element of fraud.[15] In addition, according to the DOL regulations, it appears that allegations of fraud may, in some instances, be referred to DHS rather than OIG.[16] Where investigative responsibilities overlap, federal agencies may cooperate in joint investigations.[17]

Within the DHS, the U.S. Citizenship and Immigration Services (USCIS) is responsible for adjudicating the visa petition submitted by the employer with the labor certification received from

[11] Generally, *labor certification* refers to the process in which employers must document in the application that certain conditions have been met, such as recruitment of U.S. workers and the wages, working conditions, and benefits to be provided foreign worker, so that the DOL can certify that those conditions have been met. *Labor attestation* generally refers to a process in which employers attest that such conditions have been met but do not have to submit documentation with the application. The employers instead retain documentation that the conditions have been satisfied.

[12] Labor standards laws include statutes such as the Fair Labor Standards Act (29 U.S.C. §§201 *et seq.*), the Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. §§1801 *et seq.*), and the Family and Medical Leave Act (29 U.S.C. §§2601 *et seq.*).

[13] For more information on the responsibilities of the WHD with regard to labor certification/attestation, see CRS Report RL33977, *Immigration of Foreign Workers: Labor Market Tests and Protections*, by (name redacted).

[14] The authority of the OIG is derived from a number of statutes, primarily the Inspector General Act of 1978, P.L. 95-452, 92 Stat. 1101, codified as amended at 5 U.S.C. Appendix; various provisions in the Immigration and Nationality Act (INA) and the federal criminal code at 18 U.S.C. provide authority for OIG investigations of criminal activity including immigration-related fraud.

[15] The Semiannual Report to the Congress from the OIG of DOL for the six-month period ending March 31, 2013, describes its concern that the integrity of the foreign labor certification process continues to be compromised by fraudulent or false applications filed with DOL and gives specific examples of labor certification and employment visa fraud. Joint investigations were conducted with Immigration and Customs Enforcement (ICE). Additionally, the OIG expressed concern about maintaining the integrity of the Foreign Labor Certification Program for certain visa categories, citing statutory limitations on the ability of DOL to verify labor condition information for the H-1B program and legal challenges delaying the implementation of new 2012 rules for the H-2B program that would have returned to a verified labor certification instead of a simple attestation that required conditions were satisfied. Office of the Inspector General, U.S. Department of Labor, Semiannual Report to the Congress, October 1, 2012 - March 31, 2013, vol. 69 at 5, 13, 45 (2013).

[16] For example, with regard to labor certification for H-2A workers, 20 C.F.R. §655.184(a) provides that if possible fraud or willful misrepresentation involving the labor certification application is discovered, the OFLC Administrator may refer the matter to both the DHS and the DOL's OIG for investigation.

[17] See *supra*, note 15.

the DOL. The U.S. Immigration and Customs Enforcement (ICE) within the DHS has jurisdiction over non-compliance with other conditions (i.e., conditions other than labor certification conditions) of temporary work visas that have been granted to aliens who are in the United States. For example, ICE may investigate whether aliens have violated their visa status by terminating employment for which the visa was granted and remaining in the United States. ICE is also responsible for investigating violations of immigration laws related to unlawful employment of aliens. For example, ICE conducts traditional worksite enforcement by investigating and bringing criminal charges against employers that intentionally violate the law and knowingly hire illegal aliens.

Undocumented Workers and U.S. Labor and Employment Laws

In 1984, the U.S. Supreme Court concluded that the National Labor Relations Act (NLRA) protects undocumented workers and their right to organize and engage in collective bargaining. Since the Court's decision in *Sure-Tan, Inc. v. National Labor Relations Board*,[18] the Fair Labor Standards Act (FLSA) has also been construed to apply to undocumented workers.[19] In general, courts have premised their decisions on the NLRA and FLSA's broad definitions of the term "employee." For example, because the FLSA defines an employee simply as "any individual employed by an employer," courts have declined to limit the term to American workers and those who are certified for employment in the United States.[20]

In *Sure-Tan*, a group of undocumented workers were terminated after they voted in a union election that was opposed by their employer, a leather processing company. Following the election, Sure-Tan asked the Immigration and Naturalization Service (INS), the precursor to the DHS immigration divisions,[21] to investigate the immigration status of some of the employees who voted in the election. After an INS investigation of all of Sure-Tan's Spanish-speaking workers, five employees accepted the agency's grant of voluntary departure. The Acting Regional Director for the National Labor Relations Board (NLRB) later alleged that Sure-Tan's actions constituted an unfair labor practice in violation of the NLRA.

The Supreme Court found that the NLRA's terms and policies support the statute's application to undocumented workers. The NLRA indicates that "[t]he term 'employee' shall include any employee," subject only to certain specified exceptions.[22] Noting that undocumented aliens are not among the groups of workers expressly exempted, the Court reasoned that "they plainly come within the broad statutory definition of 'employee.'"[23]

[18] 467 U.S. 883 (1984).

[19] *See* Patel v. Quality Inn South, 846 F.2d 700 (11th Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989).

[20] *See, e.g.*, 29 U.S.C. §203(e)(1).

[21] Prior to the establishment of DHS and its immigration components, U.S. Citizenship and Immigration Services (USCIS), Immigration and Customs Enforcement (ICE), and Customs and Border Protection (CBP), the Immigration and Naturalization Service (INS) in the U.S. Department of Justice served similar administrative and enforcement functions.

[22] 29 U.S.C. §152(3).

[23] *Sure-Tan*, 467 U.S. at 892.

The Court further maintained that the coverage of undocumented workers by the NLRA is consistent with the statute's "avowed purpose of encouraging and protecting the collective-bargaining process."[24] If undocumented workers could not participate in union activities, a subclass of workers would be created. The Court believed that this subclass would erode the unity of all employees and impede effective collective bargaining because the group would not have a comparable stake in the collective goals of their co-workers.[25]

Although the *Sure-Tan* Court determined that the company violated the NLRA, it nevertheless reversed a remedial order for six months of backpay for each of the affected employees. The Court maintained that the backpay award was not sufficiently tailored to the actual, compensable injuries suffered by the discharged workers. The Court explained that the imposition of the award without regard to the workers' circumstances "constitute[d] pure speculation and [did] not comport with the general reparative policies of the NLRA."[26] In particular, the Court noted that the relevant employees should have been "deemed 'unavailable' for work ... during any period when they were not lawfully entitled to be present and employed in the United States."[27] An award of six months of backpay did not reflect the employees' actual economic losses or legal availability for work.[28]

The Court revisited the issue of backpay awards in *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, a 2002 case involving the termination of undocumented workers who supported a union organizing campaign.[29] In *Hoffman*, the Court held that the NLRB's ability to award backpay to an undocumented worker is foreclosed by federal immigration policy, as expressed in the Immigration Reform and Control Act of 1986 (IRCA). The Court explained that the employee verification system established by IRCA made combating the employment of undocumented aliens central to the policy of immigration law.[30] If an employer unknowingly hires an undocumented alien or an alien becomes unauthorized while employed, the employer is required by IRCA to terminate the worker or be subject to civil penalties. According to the Court, a backpay award to an undocumented alien would run counter to the policies established by the IRCA. The Court maintained: "[A]warding backpay in a case like this not only trivializes the immigration laws, it also condones and encourages future violations."[31]

The *Hoffman* Court insisted that other sanctions were available to remedy the company's unfair labor practices. The Court cited the NLRB's issuance of cease and desist orders against Hoffman, and the agency's requirement that the company post a notice identifying the rights provided by the NLRA. The Court noted that such "traditional remedies" are "sufficient to effectuate national labor policy regardless of whether the 'spur and catalyst' of backpay accompanies them."[32]

Whether the FLSA protects undocumented workers was considered by the U.S. Court of Appeals for the Eleventh Circuit in 1988. In *Patel v. Quality Inn South*, a hotel employee alleged

[24] *Id*.

[25] *Id*.

[26] *Sure-Tan*, 467 U.S. at 901.

[27] *Sure-Tan*, 467 U.S. at 903.

[28] *Sure-Tan*, 467 U.S. at 904.

[29] 535 U.S. 137 (2002).

[30] *Hoffman*, 535 U.S. at 147.

[31] *Hoffman*, 535 U.S. at 150.

[32] *Hoffman*, 535 U.S. at 152.

violations of the FLSA and sought unpaid wage payments.[33] The defendants argued that the employee was not protected by the statute because he was an undocumented alien.[34]

Based on the text of the FLSA and its legislative history, the Eleventh Circuit concluded that undocumented workers are covered by the statute. Like the NLRA, the FLSA broadly defines the term "employee" to mean "any individual employed by an employer."[35] Although specific exceptions to this broad definition are identified, undocumented workers are not among them. The Eleventh Circuit observed:

> This definitional framework—a broad general definition followed by several specific exceptions—strongly suggests that Congress intended an all encompassing definition of the term "employee" that would include all workers not specifically excepted.[36]

The legislative history of the FLSA confirmed that a broad definition was intended by the measure's chief sponsor in the Senate.[37]

Unlike the Supreme Court, which viewed the awarding of backpay for NLRA violations as inconsistent with the IRCA, the Eleventh Circuit concluded in *Patel* that the FLSA's full range of remedies should be available without regard to immigration status. The Eleventh Circuit distinguished Patel from the workers in *Sure-Tan*, noting that Patel was seeking to recover wages for work already performed:

> Patel is not attempting to recover back pay for being unlawfully deprived of a job. Rather he simply seeks to recover unpaid minimum wages and overtime for work already performed. Under these circumstances the rationale the Supreme Court used in *Sure-Tan* to limit the availability of back pay under the NLRA to periods when the employee was lawfully present in the United States is inapplicable. It would make little sense to consider Patel "unavailable" for work during a period of time when he was actually working.[38]

Patel has been followed by other courts.[39] In *Lucas v. Jerusalem Cafe*, the U.S. Court of Appeals for the Eighth Circuit maintained that the "FLSA's sweeping definitions of 'employer' and 'employee' unambiguously encompass unauthorized aliens."[40] Moreover, the Eighth Circuit found that allowing undocumented workers to recover damages for work actually performed is consistent with the IRCA. The Eighth Circuit noted that the FLSA and the IRCA "together promote dignified employment conditions for those working in the country, regardless of immigration status, while firmly discouraging the employment of individuals who lack work authorization."[41]

[33] *See* footnote 19.

[34] *Patel*, 846 F.2d at 701.

[35] 29 U.S.C. §203(e)(1).

[36] *Patel*, 846 F.2d at 702.

[37] *Id*.

[38] *Patel*, 846 F.2d at 705-06.

[39] *See, e.g.*, Contreras v. Corinthian Vigor Ins. Brokerage, 25 F.Supp.2d 1053 (N.D. Cal. 1998).

[40] 721 F.3d 927, 934 (8th Cir. 2013).

[41] *Lucas*, 721 F.3d at 936.

In a 2008 fact sheet, the WHD of the DOL emphasized that it would continue to enforce the FLSA without regard to whether an employee is undocumented.[42] The WHD sought to distinguish the Court's decision in *Hoffman* from actions brought by undocumented workers under the FLSA.[43] The WHD maintained that claims brought under the FLSA seek backpay for hours actually worked, and that the Supreme Court's concern with awarding backpay under the NLRA did not apply to work actually performed.[44]

Other Protections

Private Causes of Action

Although the INA and the NLRA rely on enforcement by federal administrative agencies or bodies, private remedies are available under the FLSA[45] and some state laws. Unlike the FLSA, the Migrant Seasonal and Agricultural Workers Protection Act (MSAWPA) excludes H-2A agricultural workers from its coverage, but it does not exclude other categories of nonimmigrant workers who may be performing some types of agricultural work. As a consequence, H-2B forestry workers have brought claims under the MSAWPA private cause of action.[46] Also, foreign guest workers have sued employers for claims under state laws regarding tort and breach of contract in addition to state labor laws paralleling federal laws on wages and other working conditions.[47] Some breach of contract claims are based on violations of federal immigration laws establishing worker conditions that must be included in a job contract/offer.[48]

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[42] *See* U.S. Dept. of Labor, Wage and Hour Division, Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastics Decision on Laws Enforced by the Wage and Hour Division (July 2008), *available at* http://www.dol.gov/whd/regs/compliance/whdfs48.pdf.

[43] *Id*.

[44] *Id*.

[45] 29 U.S.C. §216(b).

[46] 29 U.S.C. §1854. Contracts between employers and H-2A workers must include the provisions required by 20 C.F.R. §655.122. In addition to details regarding INA requirements on housing, transportation, adverse effect wage rate, etc. and related regulations for the H-2A program, 20 C.F.R. §655.122 stipulates:

> (q) Disclosure of work contract. The employer must provide to an H-2A worker no later than the time at which the worker applies for the visa, or to a worker in corresponding employment no later than on the day work commences, a copy of the work contract between the employer and the worker in a language understood by the worker as necessary or reasonable. For an H-2A worker going from an H-2A employer to a subsequent H-2A employer, the copy must be provided no later than the time an offer of employment is made by the subsequent H-2A employer. At a minimum, the work contract must contain all of the provisions required by this section. In the absence of a separate, written work contract entered into between the employer and the worker, the required terms of the job order and the certified Application for Temporary Employment Certification will be the work contract.

Thus, although INA §218 itself does not establish a private cause of action, the requirements that are incorporated into the work contract provide the basis for a breach of contract claim under state law (and with regard to applicable minimum wages, the FLSA).

[47] See, for example, the Southern Poverty Law Center website, http://www.splcenter.org/what%20we%20do/campaign%20for%20guest%20worker%20justice/case%20docket/Other%20Organizations'%20Cases.

[48] *Id*. However, not all claims of breach of contract based on immigration law are successful. For example, in Edwards v. Geisinger Clinic, No. 11-1528 (3d Cir. Jan. 23, 2012), an H-1B physician claimed that his job termination was a breach of contract because the three-year period of H-1B status was the term of the contract. However, the court held that the contract itself stated that employment was at-will and there could be no implied period based on the visa terms, (continued...)

Legal Services Corporation

Generally, Legal Services Corporation (LSC), an independent corporation created by Congress to provide access to legal services for low-income Americans by awarding grants to legal services providers,[49] is governed by federal laws that have not permitted it to provide legal representation to nonimmigrant workers, except to H-2A nonimmigrant agricultural workers to litigate employer violations of contracts or labor conditions/certifications for the purpose of preserving the integrity of the H-2A program.[50] A recent proposed rulemaking would revise the LSC rules to extend services to H-2B forestry workers to implement recent statutory changes.[51]

Legislation in the 113th Congress

Legislation in the 113th Congress would reform foreign guest worker visa categories to strengthen worker protections while increasing flexibility and responsiveness to employer needs. S. 744, Border Security, Economic Opportunity, and Immigration Modernization Act, among other things, would reverse the effect of *Hoffman* by permitting all workplace remedies to apply regardless of immigration status and would thereby make reinstatement available for those

(...continued)

because the three years represented the maximum initial period possible for the visa status and the immigration laws anticipated that job termination could occur before the expiration of the maximum three-year period.

[49] *See* information about LSC and its governing laws at http://www.lsc.gov/about/what-is-lsc and http://www.lsc.gov/about/lsc-act-other-laws.

[50] Below, an excerpt from the IRCA 1986 conference report describes the availability of LSC to H-2A workers for lawsuits to enforce the contract terms required under INA 218 and related regulations.

> SEC. 305. Eligibility of H-2 Agricultural Workers for Certain Legal Assistance.
>
> A nonimmigrant worker admitted to or permitted to remain in the United States under section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)(ii)(a)) for agricultural labor or service shall be considered to be an alien described in section 101(a)(20) of such Act (8 U.S.C. 1101(a)(20)) for purposes of establishing eligibility for legal assistance under the Legal Services Corporation Act (42 U.S.C. 2996 et seq.), but only with respect to legal assistance on matters relating to wages, housing, transportation, and other employment rights as provided in the worker's specific contract under which the nonimmigrant was admitted. [P. 70 of H. Rept. 99-1000]
>
> Legal Services for H-2 Workers
>
> The House amendment specified that nonimmigrant workers admitted or permitted to remain in the United States for agricultural labor or services shall be treated like lawful permanent resident aliens for purposes of eligibility for legal services under the Legal Services Corporation Act
>
> The Senate bill contained no comparable provision.
>
> The Conference substitute provides that such foreign agricultural workers will be eligible for legal services.
>
> Legal services are to be made available to H-2 aliens with regard to housing, wages, transportation and other conditions of employment under their H-2 contract. Legal services are not meant to be an organizing tool in behalf of farm workers and are not meant to be used in order to harass growers. It is the intent of the Conferees that contracts entered into shall not violate any provision of the Immigration and Nationality Act authorizing the H-2 program or any regulations issued pursuant to that Act. Further, the Conferees intend that the Conference substitute will secure the rights of H-2 agricultural workers under the specific contract under which they were admitted to this country.
>
> [p. 94 of H. Rept. 99-1000]

[51] 78 Fed. Reg. 51696 (Aug. 21, 2013), 45 C.F.R. Part 1626, Restrictions on Legal Assistance to Aliens.

authorized to work; create new nonimmigrant worker categories, including two that would replace the H-2A category; establish whistleblower protections; and extend coverage of the MSAWPA to include all nonimmigrant agricultural workers.[52] H.R. 2131, the Supplying Knowledge-based Immigrants and Lifting Levels of STEM[53] Visas Act or SKILLS[54] Visa Act, among other things, would specify employment protections, such as wages, working conditions, contract requirements, for various high-skilled, professional visa categories that currently do not have such protections; require verification of foreign degrees; increase H-1B[55] numerical limits; authorize streamlined certification procedures for employers filing multiple petitions for workers in certain visa categories; and authorize the Secretary of Labor to subpoena employers of H-1B, H-1B1,[56] and E-3[57] nonimmigrant workers. H.R. 1773 would establish a new H-2C agricultural worker visa category, which, however, would be excluded from coverage by the MSAWPA.[58]

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[52] For more information, *see* CRS Report R43097, *Comprehensive Immigration Reform in the 113th Congress: Major Provisions in Senate-Passed S. 744*, by (name redacted) and (name redacted).

[53] STEM is an acronym for science, technology, engineering, and mathematics and is often used in immigration policy proposals and legislation to refer to highly-skilled, professional foreign workers and advanced students in such fields, who are considered desirable immigrants.

[54] SKILLS is the acronym for the longer title of the bill, Supplying Knowledge-based Immigrants and Lifting Levels of STEM Visas Act.

[55] H-1B nonimmigrant workers are coming to the United States temporarily to work in a skilled, specialty occupation; this visa/status category is established by INA §101(a)(15)(H)(i)(b), codified as amended at 8 U.S.C. §1101(a)(15)(H)(i)(b).

[56] H-1B1 nonimmigrant workers are H-1B workers who are nationals of countries with whom the U.S. has free trade agreements establishing annual numerical limits for initial visa approvals, specifically, Chile and Singapore; this visa/status category is established by INA §101(a)(15)(H)(i)(b1), codified as amended at 8 U.S.C. §1101(a)(15)(H)(i)(b1).

[57] E-3 nonimmigrants are specialty occupation professionals from Australia and are similar in nature to H-1Bs; this visa/status category is established by INA §101(a)(15)(e)(iii), codified as amended at 8 U.S.C. §1101(a)(15)(e)(iii).

[58] For more information, *see* CRS Report R43161, *Agricultural Guest Workers: Legislative Activity in the 113th Congress*, by (name redacted).