

UNITED STATES SENATE  
COMMITTEE ON THE JUDICIARY  
WASHINGTON, DC 20540-5000  
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## United States Senate

COMMITTEE ON THE JUDICIARY  
WASHINGTON, DC 20540-5000

April 25, 2018

### VIA ELECTRONIC SUBMISSION

The Honorable Kirstjen Nielsen  
Secretary  
U.S. Department of Homeland Security  
Washington, D.C. 20528

The Honorable R. Alexander Acosta  
Secretary  
U.S. Department of Labor  
Washington, D.C. 20520

Dear Secretary Nielsen and Secretary Acosta:

I am writing to express my concerns regarding the approval of more foreign workers on H-2B visas, and the impact this will have on U.S. workers.

The recently passed omnibus appropriations bill permits Secretary Nielsen to distribute extra H-2B visas beyond the 66,000 cap if she, in consultation with Secretary Acosta, determines that "businesses cannot be satisfied in fiscal year 2018 with United States workers who are willing, qualified, and able to perform temporary nonagricultural labor."<sup>1</sup> A similar provision was included in the fiscal year 2017 omnibus.<sup>2</sup> While I understand and sympathize with the needs of employers who rely on seasonal H-2B workers when the U.S. workforce can't meet demand, unless the H-2B program is carefully managed, it puts all workers at risk.<sup>3</sup>

The program is not only used by small and seasonal employers.<sup>4</sup> Large corporations employ significant numbers of H-2B workers as well. Studies show that wages have stagnated<sup>5</sup> and there has

<sup>1</sup> Consolidated Appropriations Act, 2018, Pub. L. No. 115-141 (2018).

<sup>2</sup> See Consolidated Appropriations Act, 2017, Pub. L. No. 115-31 (2017).

<sup>3</sup> See, e.g., Chairman Grassley, Statement for the Record, Senate Judiciary Committee Hearing "The H-2B Temporary Foreign Worker Program: Examining the Effects on Americans' Job Opportunities and Wages," Jun. 8, 2016 available at <https://www.grassley.senate.gov/news/news-releases/grassley-statement-judiciary-committee-hearing-h-2b-temporary-foreign-worker>.

<sup>4</sup> AFL-CIO, *Fact Sheet on why the H-2B Program is Bad for Working People* June 23, 2016 available at <https://aflcio.org/about/advocacy/legislative-alerts/fact-sheet-why-h-2b-program-bad-working-people> [hereinafter AFL-CIO].

<sup>5</sup> Costa, Daniel, *the H-2B Temporary Foreign Worker Program – For Labor Shortages or Cheap, Temporary Labor?* Jan. 19, 2016, ECON. POLY INST. available at <http://www.epi.org/publication/h2b-temporary-foreign->

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been a significant “long-term decline in the labor force participation rate”<sup>6</sup> for U.S. workers in H-2B fields. Some studies have shown that employers using H-2B workers undercut the wages of similarly employed U.S. workers by nearly twenty-five percent.<sup>7</sup>

On top of the harm to American workers, some unscrupulous employers take advantage of H-2B workers’ unique vulnerabilities, which can result in human trafficking and labor abuse.<sup>8</sup> Because employers control workers’ visa status “[t]he H-2B program greatly reduces the likelihood that workers will leave an abusive employer or complain about unpaid wages or poor working conditions.”<sup>9</sup> As one investigator put it: “[t]he way H-2 visas shackle workers to a single employer leaves them almost no leverage to demand better treatment.”<sup>10</sup> A recent investigation showed that the program condemns thousands of workers each year “to exploitation and mistreatment, often in plain view of the government officials charged with protecting them.”<sup>11</sup>

For all of these reasons, last year a bipartisan group of Senators wrote then Secretary Kelly and Secretary Acosta expressing severe concern with any potential increase in the number of H-2B visas.<sup>12</sup> In our letter, we stressed that such a determination to increase the number of H-2B visas should not be made lightly.<sup>13</sup> We requested that, at a minimum, any increase in H-2B visas be supported by statistical data, an assessment of the projected needs of specific businesses, evaluation of employer recruitment efforts, fair calculations of the relevant prevailing wage, and a review of potential labor pools’ qualifications and availability.<sup>14</sup>

I ask that all of the above factors are considered and your determinations are supported by statistical data before Secretary Nielsen exercises the discretion afforded to her by the fiscal year 2018 omnibus appropriations bill. Congress needs to understand all factors that could encourage businesses to hire foreign nationals, instead of U.S. workers, so that we can best protect our American interests.

After making such an assessment, if Secretary Nielsen determines that an increase beyond the statutory cap is necessary, I request that, at a minimum, she impose the same conditions Secretary

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worker-program-for-labor-shortages-or-cheap-temporary-labor/ (“The evidence presented here—flat wages and persistent high unemployment rates in the top 15 H-2B occupations for the past decade—sheds doubt on claims that there are labor shortages in the top 15 H-2B occupations”).

<sup>6</sup> See Department of Labor, Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey*, available at <https://data.bls.gov/timeseries/LNS11300000> (showing a reduction from 66 percent to 62.9 percent, from 2007 to 2017; statistics generated on May 15, 2017); see also Camarota, Steven A., *The Employment Situation of Immigrants and Natives in the First Quarter of 2017*, BLS Data Shows Labor Force Participation Remains Abysmal, May 2017, Cent. For Imm. Studies available at <http://cis.org/sites/cis.org/files/u6-q1-17.pdf>.

<sup>7</sup> AFL-CIO, *Fact Sheet on why the H-2B Program is Bad for Working People* June 23, 2016 available at <https://aflcio.org/about/advocacy/legislative-alerts/fact-sheet-why-h-2b-program-bad-working-people>.

<sup>8</sup> See generally, Polaris Project, *Labor Trafficking in the U.S.: A Closer Look at Temporary Work Visas* Oct. 2015 available at <http://polarisproject.org/resources/labor-trafficking-us-closer-look-temporary-work-visas>.

<sup>9</sup> *Supra* note 7.

<sup>10</sup> Bensinger, Ken; Garrison, Jessica; and Singer-Vine, Jeremy; *The New American Slavery: Invited to the U.S., Foreign Workers Find a Nightmare* BuzzFeed News July 25, 2015 available at <https://www.buzzfeed.com/jessicagarrison/the-new-american-slavery-invited-to-the-us-foreign-workers-f>.

<sup>11</sup> *Id.*

<sup>12</sup> See, e.g., Letter from Charles Grassley, Richard Durbin, Richard Blumenthal, and David Perdue to John Kelly, Secretary, DHS, and Alexander Acosta, Secretary, Department of Labor (May 17, 2017).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*



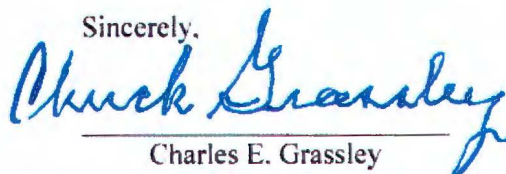
Kelly imposed when he authorized a *one-time* increase. In the final rule, published on July 19, 2017, Secretary Kelly authorized the issuance of 15,000 additional H-2B visas for businesses that demonstrated they were likely to experience “irreparable harm” without the ability to employ H-2B workers.<sup>15</sup> Under this irreparable harm standard, only 12,294 additional visas were actually issued for American businesses.<sup>16</sup> Clearly, the irreparable harm was an important step in protecting American workers and ensuring that *only* those businesses who truly needed foreign workers received them.

If Secretary Nielsen waives the H-2B cap, I also request that Secretary Nielsen require mandatory audits of every petition made under an irreparable harm attestation. Mandatory audits ensure that every single business actually meets the irreparable harm standard. Requiring mandatory audits would also prevent otherwise scrupulous employers from gaming the system and receiving a limited number of visas which should be available to businesses that truly demonstrate need.

Finally, in addition to re-imposing the irreparable harm standard and requiring the mandatory auditing of any petition filed under this standard, I ask that Secretary Nielsen require, as a condition of receiving any H-2B visa under such an increase, that employers enroll in the E-Verify program. By requiring employers to use E-Verify for all of their employees, Secretary Nielsen can safeguard job opportunities for American workers and ensure that only businesses that follow the law and hire *legal workers* receive additional work visas.

I look forward to your joint determination on whether to increase the number of available H-2B visas. I am confident that you will act consistent with the President’s desire to promote and protect American workers, and will impose much needed integrity measures if the statutory cap is increased. The American people expect as much. Thank you in advance for your cooperation with this request. If you have questions, please contact Brad Watts or Katherine Nikas at (202) 224-5225.

Sincerely,



Charles E. Grassley  
United States Senator

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<sup>15</sup> 82 C.F.R. 32987 (2017).

<sup>16</sup> Approved H-2B Cap-Subject Beneficiaries by Job Code, Fiscal Year 2017, U.S. Citizenship and Immigration Services, *available at* <https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/H-2B/FY17-H2B-Cap-Subject-Characteristic-12.07.17.pdf>.



**U.S. Citizenship  
and Immigration  
Services**

July 6, 2018

The Honorable Charles E. Grassley  
United States Senate  
Washington, DC 20510

Dear Senator Grassley:

Thank you for your April 25, 2018 letter. Secretary Nielsen asked that I respond on her behalf.

Your letter urges Secretary Nielsen and Secretary Acosta to consider a number of factors when determining whether to temporarily increase the number of H-2B visas for seasonal, temporary foreign workers for the remainder of the fiscal year (FY), as permitted by the FY 2018 Omnibus. Specifically, you suggest the following:

- At a minimum, any increase in H-2B visas should be supported by statistical data, an assessment of the projected needs of specific businesses, evaluation of employer recruitment effort, fair calculations of the relevant prevailing wage, and a review of potential labor pools' qualifications and availability.
- A decision to increase the H-2B numbers should contain the same conditions Secretary Kelly imposed when he authorized a one-time increase, specifically, the irreparable harm standard.
- The Department of Homeland Security (DHS) and the Department of Labor (DOL) should conduct mandatory audits on all petitions accompanied by an irreparable harm attestation.
- DHS should require all employers receiving H-2B visas under the supplemental cap to be enrolled in E-Verify program.

On May 31, 2018, DHS and DOL published a temporary final rule increasing the cap on H-2B nonimmigrant visas by up to 15,000 additional visas through the end of FY 2018. Like last year, these visas are available only to American businesses which, among other requirements, attest that they will likely suffer irreparable harm without the ability to employ all the H-2B workers requested in their petition. In addition, these petitioners will have established, by obtaining a temporary labor certification from DOL, that there are no willing and available U.S. workers to fill the offered positions. As an additional safeguard, if the employer has a current temporary labor certification with a work start date before April 15, 2018, it must conduct a fresh round of recruitment for U.S. workers. This protects U.S. workers by re-confirming that there are not enough willing, qualified and able U.S. workers to fill these positions.



On June 6, 2018, U.S. Citizenship and Immigration Services (USCIS) announced that during the first five business days of filing for a visa available under the FY 2018 supplemental cap it received petitions for more beneficiaries than the number of H-2B visas available under that cap. Accordingly, USCIS is required by regulation to use a computer-generated process, commonly known as a lottery, to randomly select sufficient petitions to meet the increased cap for FY 2018. The lottery was completed on June 7, 2018, and included all H-2B cap-subject petitions received between May 31, 2018 and June 6, 2018.

As with the essentially identical provision authorizing the Secretary to augment the H-2B statutory cap in FY 2017, the Department did not ask for, and does not wish to have the discretion to increase the H-2B visa cap afforded under the FY 2018 Omnibus. I share Secretary Nielsen's opinion that Members of Congress have the best information to know the "right" number of H-2B visas needed to support American businesses without harming American workers.<sup>1</sup> This is because congressional representatives have the best understanding of their constituencies and the needs of their local employers.

Further, I share the Secretary's desire to work together with Congress to limit H-2B visas to employers with truly temporary needs, and to find solutions to most effectively allocate available H-2B visas throughout the year. In the coming months, DHS will be submitting a congressionally-mandated report that details options for addressing the issue of late-season filers in the H-2B program that are currently unable to obtain visas. This report will include options on how the program can better serve our national interests. I would be happy to work with you and your staff on legislative changes that may improve the program. DHS strongly encourages that any new H-2B cap provision contemplated by Congress should include a requirement for petitioning employers to enroll and participate in the E-Verify program.

DHS is committed to ensuring that our immigration system is implemented lawfully and that American workers are protected. If members of the public have information that a participating employer may be abusing this program, DHS invites them to submit information to [ReportH2BAbuse@uscis.dhs.gov](mailto:ReportH2BAbuse@uscis.dhs.gov) and include information identifying the H-2B petitioning employer and relevant information that leads them to believe that the H-2B petitioning employer is abusing the H-2B program.

Thank you again for your letter and interest in this important issue. Should you require any additional assistance, please have your staff contact the USCIS Office of Legislative and Intergovernmental Affairs at (202) 272-1940.

Respectfully,



L. Francis Cissna  
Director

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<sup>1</sup> See Testimony of DHS Secretary Nielsen, House Committee on Appropriations, Subcommittee on Homeland Security, FY 2019 Budget Hearing – Department of Homeland Security (April 11, 2018) (<https://appropriations.house.gov/calendararchive/eventsingle.aspx?EventID=395210>).