

111<sup>TH</sup> CONGRESS  
1<sup>ST</sup> SESSION

# H. R. 4381

To reform the H-2B program, and for other purposes.

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## IN THE HOUSE OF REPRESENTATIVES

DECEMBER 16, 2009

Ms. ZOE LOFGREN of California (for herself and Mr. GEORGE MILLER of California) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Education and Labor, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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## A BILL

To reform the H-2B program, and for other purposes.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*

3       **SECTION 1. SHORT TITLE.**

4       This Act may be cited as the “H-2B Program Re-  
5       form Act of 2009”.

6       **SEC. 2. PROTECTING UNITED STATES AND H-2B WORKERS.**

7       (a) IN GENERAL.—Section 212(o) of the Immigra-  
8       tion and Nationality Act (8 U.S.C. 1182(o)) is amended  
9       to read as follows:

1       “(o) REQUIREMENTS FOR ADMISSION OF H-2B  
2 WORKERS.—

3           “(1) CERTIFICATION OF ALIEN.—Any alien who  
4 seeks to enter the United States for the purpose of  
5 performing temporary labor or services under section  
6 101(a)(15)(H)(ii)(b) is inadmissible unless the Sec-  
7 retary of Labor has determined and certified to the  
8 Secretary of State and the Secretary of Homeland  
9 Security that—

10           “(A) there are not sufficient United States  
11 workers who are able, willing, qualified, and  
12 who will be available at the time and place  
13 needed, to perform such temporary labor or  
14 services; and

15           “(B) the employment of the alien in such  
16 labor or services will not adversely affect the  
17 wages and working conditions of workers in the  
18 United States similarly employed.

19       “(2) REGISTRATION OF H-2B EMPLOYER.—

20           “(A) REGISTERED H-2B EMPLOYERS.—Ex-  
21 cept as provided in paragraph (5), any employer  
22 who seeks to employ an H-2B nonimmigrant in  
23 an occupational classification must file with the  
24 Secretary of Labor an application for registra-  
25 tion stating the following:

1           “(i) A specification of the number of  
2           H–2B nonimmigrants sought to be em-  
3           ployed, the occupational classifications and  
4           locations in which such H–2B non-  
5           immigrants will be employed, and the an-  
6           ticipated period of employment (including  
7           the expected beginning and termination  
8           dates).

9           “(ii) Evidence that—

10           “(I) the employer needs such  
11           workers to address temporary, pre-  
12           dictable, and recurring needs for labor  
13           or services directly resulting from cli-  
14           matic, environmental, or other natural  
15           conditions related to certain seasons  
16           of the year; and

17           “(II) labor, geographic, or other  
18           conditions substantially prevent the  
19           employer from meeting such needs for  
20           labor or services with workers in the  
21           United States.

22           “(iii) Each instance in which the em-  
23           ployer has been found, within the last 3  
24           years, to have violated any foreign worker

1 program or any Federal, State, or local  
2 employment-related law or regulation.

3 “(B) EXCLUSION OF CERTAIN EMPLOY-  
4 ERS.—

5 “(i) LABOR CONTRACTING ENTI-  
6 TIES.—An employer may not be registered  
7 under this paragraph if the employer—

8 “(I) contracts labor or services  
9 on a temporary basis to one or more  
10 entities, which are not affiliates,  
11 branches, or subsidiaries of the em-  
12 ployer; and

13 “(II) will not exercise supervision  
14 or control in the performance of the  
15 labor or services to be performed by  
16 the H-2B nonimmigrant (other than  
17 the hiring, paying, or firing of work-  
18 ers).

19 “(ii) CONSTRUCTION ENTITIES.—At  
20 the beginning of each registration period  
21 described in subparagraph (C)(i), the Sec-  
22 retary of Labor shall issue a certification  
23 of the average national unemployment rate  
24 for wage and salary workers in the experi-  
25 enced labor force in the construction occu-

1 pations for the preceding 12 months. An  
2 employer may not be registered under this  
3 paragraph to employ H-2B nonimmigrants  
4 in any construction occupation unless the  
5 unemployment rate in such certification is  
6 less than 6 percent. Any registration  
7 issued pursuant to this clause shall be re-  
8 voked if the unemployment rate in a subse-  
9 quent certification is greater than 7 per-  
10 cent.

11 “(C) ADJUDICATION BY SECRETARY OF  
12 LABOR.—

13 “(i) REGISTRATION PERIOD.—The  
14 Secretary of Labor shall establish a reg-  
15 istration period, of at least 90 days, during  
16 which employers may submit applications  
17 for registration under subparagraph (A).  
18 The Secretary shall adjudicate such appli-  
19 cations not later than 30 days after the  
20 end of the registration period.

21 “(ii) ADJUDICATION.—For each reg-  
22 istered employer, the Secretary of Labor  
23 shall set the number of H-2B non-  
24 immigrant positions that such employer is  
25 approved to use. Registration under this

1 paragraph shall not expire until the end of  
2 the third fiscal year beginning after the  
3 date of registration.

4 “(iii) FEES.—

5 “(I) APPLICATION FOR REG-  
6 ISTRATION.—In addition to any other  
7 fees authorized by law, the Secretary  
8 of Labor shall impose a \$100 fee, to  
9 be deposited in the Treasury in ac-  
10 cordance with section 286(w), on an  
11 employer that submits an application  
12 for registration.

13 “(II) WORKER POSITIONS RE-  
14 QUESTED.—The Secretary shall also  
15 impose a fee, to be deposited in the  
16 Treasury in accordance with section  
17 286(v), on an employer for each H-  
18 2B worker position requested in such  
19 application. The additional fee shall  
20 be \$100 for each H-2B worker posi-  
21 tion requested.

22 “(3) LABOR CERTIFICATION APPLICATION.—

23 Except as provided in paragraph (5), any employer  
24 who seeks to employ an H-2B nonimmigrant in an  
25 occupational classification must be registered under

1 paragraph (2) and must file with the Secretary of  
2 Labor, not later than 60 days before the first date  
3 that such employer requires the labor or services of  
4 the H-2B nonimmigrant, an application containing  
5 the following assurances:

6 “(A) A specification of the number of H-  
7 2B nonimmigrant positions requested, the occu-  
8 pational classifications and locations in which  
9 such workers will be employed, the wage rate  
10 and conditions under which they will be em-  
11 ployed, and the expected start and end dates of  
12 employment.

13 “(B) The employer—

14 “(i) if the job opportunity is covered  
15 by a collective bargaining agreement, is of-  
16 fering and will offer during the period of  
17 authorized employment to H-2B non-  
18 immigrants wages as set forth in the col-  
19 lective bargaining agreement;

20 “(ii) if the job opportunity is not cov-  
21 ered by a collective bargaining agreement,  
22 is offering and will offer during the period  
23 of authorized employment to H-2B non-  
24 immigrants wages that are at least—

1                   “(I) the actual wage level paid by  
2                   the employer to all other individuals  
3                   with similar experience and qualifica-  
4                   tions for the specific employment in  
5                   question; or

6                   “(II) the wage level for the occu-  
7                   pational classification in the area of  
8                   employment;

9                   whichever is greater, based on the best in-  
10                  formation available as of the time of filing  
11                  the application; and

12                  “(iii) will provide working conditions  
13                  for such nonimmigrants that will not ad-  
14                  versely affect the working conditions of  
15                  workers similarly employed.

16                  “(C) There is not a strike or lockout in the  
17                  course of a labor dispute in the occupational  
18                  classification at the place of employment.

19                  “(D) The employer did not displace and  
20                  will not displace a United States worker em-  
21                  ployed by the employer within the period begin-  
22                  ning 90 days before the start date and ending  
23                  on the end date for which the employer requests  
24                  the services of an H-2B nonimmigrant on an



1 application for labor certification under this  
2 subsection.

3 “(E) The employer has—

4 “(i) taken, and will continue to take,  
5 good faith steps to recruit United States  
6 workers in the United States, using the  
7 procedures described in paragraph (4) and  
8 offering compensation, benefits and work-  
9 ing conditions that are at least as great as  
10 that required to be offered to H-2B non-  
11 immigrants under subparagraph (B), for  
12 the job for which the nonimmigrant or  
13 nonimmigrants is or are sought; and

14 “(ii) offered the job to any United  
15 States worker who applies and is qualified  
16 for the job for which the nonimmigrant or  
17 nonimmigrants is or are sought.

18 “(F) If the job opportunity is not covered  
19 by the State workers’ compensation law, the  
20 employer will provide, at no cost to its workers,  
21 insurance covering injury and disease arising  
22 out of, and in the course of, the worker’s em-  
23 ployment which will provide benefits at least  
24 equal to those provided under the State’s work-

1           ers’ compensation law for comparable employ-  
2           ment.

3           “(G) The employer will comply with all  
4           Federal, State, and local employment-related  
5           laws and regulations.

6           “(H) The employer—

7                 “(i) will offer an H–2B nonimmigrant  
8                 the same benefits and working conditions  
9                 provided to United States workers simi-  
10                larly employed in the same occupational  
11                classification at the same place of employ-  
12                ment; and

13                “(ii) has not made an offer to a  
14                United States worker or H–2B non-  
15                immigrant that imposed restrictions or ob-  
16                ligations that are greater than those that  
17                will be imposed on any other person of-  
18                fered employment for the same job.

19           “(I) The stated requirements applicable to  
20           the job represent the actual minimum require-  
21           ments for such job, and the H–2B employer  
22           will not hire an H–2B nonimmigrant to per-  
23           form the job who does not meet these require-  
24           ments.

1           “(J) The employer has provided or shall  
2           provide to an H-2B nonimmigrant, not later  
3           than on the day work commences, a copy of the  
4           job offer containing the assurances listed in this  
5           paragraph. If the employer has used or is using  
6           a foreign labor contractor, the employer has  
7           provided or shall provide a copy of the job offer  
8           to such contractor by the time of recruitment.

9           Each application filed under this paragraph shall be  
10          accompanied by a copy of the job offer describing  
11          the wages and other terms and conditions of employ-  
12          ment of the H-2B nonimmigrant. Nothing in sub-  
13          paragraph (E) or (I) shall be construed to prohibit  
14          an employer from using legitimate selection criteria  
15          relevant to the job that are normal or customary to  
16          the type of job involved, so long as such criteria are  
17          not applied in a discriminatory manner.

18          “(4) RECRUITMENT OF UNITED STATES WORK-  
19          ERS.—Not later than 14 days before filing the appli-  
20          cation under paragraph (3), and except as provided  
21          in paragraph (5)(B), any employer who seeks to em-  
22          ploy an H-2B nonimmigrant shall take the following  
23          steps to recruit United States workers for which the  
24          alien is sought:

1           “(A) The employer shall submit a copy of  
2           the job offer, including a description of wages  
3           and other terms and conditions of employment,  
4           to the State workforce agency that serves the  
5           area of employment in the State in which the  
6           employer is located. The State workforce agency  
7           shall provide the employer with an acknowledg-  
8           ment of receipt of such documentation in ac-  
9           cordance with this paragraph.

10           “(B) The employer shall authorize the  
11           State workforce agency to post the job oppor-  
12           tunity on the Internet, with State and local job  
13           banks, with other State workforce agencies, and  
14           with unemployment agencies and other labor re-  
15           ferral and recruitment sources pertinent to such  
16           job opportunity.

17           “(C) The employer shall authorize the  
18           State workforce agency to provide notification  
19           of the job opportunity to—

20                   “(i) the central office of the State  
21                   Federation of Labor in the State in which  
22                   the job is located; and

23                   “(ii) the office of the local union  
24                   which represents the employees in the

1 same or substantially equivalent job classi-  
2 fication, if applicable.

3 “(D) The employer shall—

4 “(i) provide notice of the job oppor-  
5 tunity to the bargaining representative (if  
6 any) of the employer’s employees in the oc-  
7 cupational classification and area for which  
8 the employer is seeking a worker, or

9 “(ii) if there is no such bargaining  
10 representative, post the availability of the  
11 job opportunity for which the employer is  
12 seeking a worker in conspicuous locations  
13 at the place or places of employment or in  
14 some other manner that provides reason-  
15 able notification to all employees in the oc-  
16 cupational classification and in the same  
17 area of intended employment for which H-  
18 2B nonimmigrants are sought.

19 “(E) The employer shall advertise the  
20 availability of the job opportunity for which the  
21 employer is seeking a worker in one or more  
22 publications in the labor market that is likely to  
23 be patronized by potential applicants (as deter-  
24 mined by the State workforce agency). Such ad-  
25 vertisement, at a minimum, shall—

1 “(i) describe the job opportunity and  
2 term of employment;

3 “(ii) state the wage rate to be offered;

4 “(iii) summarize the employer’s min-  
5 imum job requirements;

6 “(iv) offer training if the job oppor-  
7 tunity is the type for which employers nor-  
8 mally provide training; and

9 “(v) be posted for 3 consecutive days,  
10 one of which must be a Sunday, during the  
11 first half of the 21-day recruitment period.

12 “(F) If the job involved in the application  
13 requires a particular skill or an advanced de-  
14 gree, and a professional or trade journal nor-  
15 mally would be used to advertise the job oppor-  
16 tunity, the local job service may require the em-  
17 ployer to place an advertisement in the journal  
18 most likely to bring responses from able, will-  
19 ing, and qualified United States workers.

20 “(G) In no event shall the employer adver-  
21 tise such job opportunity to United States  
22 workers using wages or other terms and condi-  
23 tions of employment which are less favorable for  
24 United States workers than those to be offered

1 to an H-2B nonimmigrant of similar qualifica-  
2 tions.

3 “(5) EXCEPTION TO REGISTRATION REQUIRE-  
4 MENT.—

5 “(A) IN GENERAL.—An employer that  
6 seeks to employ an H-2B nonimmigrant but is  
7 not registered under paragraph (2) may file an  
8 application under paragraph (3) to employ H-  
9 2B nonimmigrants if the employer dem-  
10 onstrates to the Secretary of Labor that:

11 “(i) the failure to hire such workers to  
12 address a temporary need for labor or  
13 services would directly result in the loss of  
14 jobs for United States workers and would  
15 deprive the impacted community of a sub-  
16 stantial economic benefit (as certified by a  
17 State or regional economic development  
18 authority, including consultation with any  
19 relevant union); and

20 “(ii) labor, geographic, or other condi-  
21 tions substantially prevent the employer  
22 from meeting such need for labor or serv-  
23 ices with workers in the United States.

24 “(B) HIRING HALL APPLICATIONS.—Any  
25 employer who seeks to hire an H-2B non-

1 immigrant under subparagraph (A) may file an  
2 application with the Secretary of Labor in ac-  
3 cordance with this subparagraph instead of  
4 complying with paragraphs (3) and (4) if—

5 “(i) the employer has signed a labor  
6 agreement with a labor organization (as  
7 defined in section 2(5) of the Labor-Man-  
8 agement Relations Act (29 U.S.C. 152(5)))  
9 under which the labor organization is re-  
10 sponsible for referring applicants for em-  
11 ployment to the employer under a proce-  
12 dure commonly known as a ‘hiring hall’ or  
13 ‘referral hall’;

14 “(ii) the application is accompanied  
15 by a written statement prepared by the  
16 labor organization attesting that—

17 “(I) the labor organization oper-  
18 ates a hiring hall that, pursuant to  
19 contractual agreement and actual  
20 practice, is a source of employees in  
21 the same or substantially equivalent  
22 occupational classification in which  
23 the employer seeks to employ an H-  
24 2B nonimmigrant;



1           “(II) the labor organization does  
2 not have a sufficient number of quali-  
3 fied applicants available for referral in  
4 the same or substantially equivalent  
5 occupational classification in which  
6 the employer seeks to employ an H-  
7 2B nonimmigrant;

8           “(III) the labor organization has  
9 advertised the availability of the job  
10 opportunity for which the employer is  
11 seeking to employ an H-2B non-  
12 immigrant in one or more publications  
13 in the labor market that is likely to be  
14 patronized by potential applicants;

15           “(IV) the employer is contrac-  
16 tually obligated to pay all employees,  
17 in the same or substantially equivalent  
18 occupational classification in which  
19 the employer seeks to employ an H-  
20 2B nonimmigrant, wages and benefits  
21 set forth in a labor agreement with  
22 the labor organization, which equals  
23 or exceeds the higher of the actual or  
24 predominant wage rate the employer  
25 would be obligated to pay; and

1                   “(V) the H–2B nonimmigrants  
2                   whom the employer seeks to employ  
3                   will be paid not less than the same  
4                   wages and benefits and be subject to  
5                   the same terms and conditions of em-  
6                   ployment set forth in the employer’s  
7                   labor agreement with the labor orga-  
8                   nization.

9                   “(6) CERTIFICATION BY SECRETARY OF  
10                  LABOR.—

11                   “(A) ADJUDICATION DEADLINE.—The Sec-  
12                   retary of Labor shall adjudicate an application  
13                   described in paragraph (3) or (5)(B) not later  
14                   than 30 days after the date on which the appli-  
15                   cation is filed.

16                   “(B) NOTICE OF DEFICIENCIES.—The em-  
17                   ployer shall be notified in writing within seven  
18                   days of the date of filing if the application does  
19                   not meet the standards for approval. Such no-  
20                   tice shall include a description of the deficiency,  
21                   and the Secretary shall provide an opportunity  
22                   for the prompt resubmission of a modified ap-  
23                   plication.

24                   “(C) FEES.—In addition to any other fees  
25                   authorized by law, the Secretary of Labor shall

1 impose a fee, to be deposited in the Treasury in  
2 accordance with section 286(w), on an employer  
3 that submits an application described in para-  
4 graph (3) or (5)(B) on or after the date that  
5 is 30 days after the date of the enactment of  
6 the H-2B Program Reform Act of 2009. The  
7 fee shall be set at a level the Secretary of Labor  
8 determines will ensure recovery of the full costs  
9 of carrying out labor certification activities  
10 under this subsection and will recover any addi-  
11 tional costs associated with the administration  
12 of the fees collected.

13 “(7) ASSIGNMENT OF H-2B POSITIONS BY SEC-  
14 RETARY OF HOMELAND SECURITY.—

15 “(A) IN GENERAL.—Upon the approval of  
16 an application described in paragraph (6)(A),  
17 an employer may petition the Secretary of  
18 Homeland Security for H-2B nonimmigrant  
19 positions up to the number approved by the  
20 Secretary of Labor.

21 “(B) NUMERICAL LIMITS.—The total num-  
22 ber of aliens who may be issued visas or other-  
23 wise provided nonimmigrant status during any  
24 fiscal year under section 101(a)(15)(H)(ii)(b)  
25 may not exceed 66,000, except that 1,000 of

1 such number shall be reserved for employers fil-  
2 ing applications pursuant to paragraph (5).

3 “(C) FAIR DISTRIBUTION SYSTEM.—The  
4 Secretary of Homeland Security shall apportion  
5 H–2B nonimmigrant positions for initial use in  
6 each quarter of the fiscal year in proportion to  
7 the demand in each quarter (as determined by  
8 the expected start dates for the employment of  
9 H–2B nonimmigrants by employers registered  
10 under paragraph (2)).

11 “(8) LIMITATIONS ON EMPLOYMENT.—

12 “(A) DURATION OF EMPLOYMENT.—Cer-  
13 tification of an H–2B nonimmigrant for em-  
14 ployment with an employer in the United States  
15 shall be limited to a maximum of 10 months.  
16 The Secretary of State and Secretary of Home-  
17 land Security shall allow admission of the H–  
18 2B nonimmigrant into the United States for  
19 additional periods, of no more than 20 days in  
20 the aggregate, to allow for travel to and from  
21 the worksite.

22 “(B) TRANSFER OF H–2B NONIMMIGRANTS  
23 BETWEEN EMPLOYERS.—

24 “(i) IN GENERAL.—An H–2B non-  
25 immigrant may not accept employment

1 from any employer in the United States  
2 other than an employer with an approved  
3 H-2B petition filed on behalf of such non-  
4 immigrant. An employer may not—

5 “(I) trade, transfer, or otherwise  
6 provide an H-2B nonimmigrant to  
7 any other employer for employment in  
8 the United States; or

9 “(II) assess any fee to an H-2B  
10 nonimmigrant with respect to such  
11 trade, transfer, or provision.

12 “(ii) CONSTRUCTION.—Nothing in  
13 this paragraph prohibits an H-2B non-  
14 immigrant in the United States from ac-  
15 cepting new employment with a new em-  
16 ployer upon approval of a petition filed by  
17 such employer on the H-2B non-  
18 immigrant’s behalf.

19 “(C) AVAILABILITY OF UNITED STATES  
20 WORKER.—An employer shall be required to  
21 offer employment to any able and qualified  
22 United States worker if such worker applies for  
23 employment in a job to be filled by an H-2B  
24 nonimmigrant at least 14 days before com-

1           mencement of the H-2B nonimmigrant’s em-  
2           ployment.

3           “(9) COMPLIANCE AND STATISTICS.—

4                   “(A) PUBLIC EXAMINATION.—The Sec-  
5           retary of Labor shall make available for public  
6           examination, including by posting over the  
7           Internet, the following:

8                           “(i) within 60 days of the close of the  
9                           registration period under paragraph (2), a  
10                          list of all employers registered under such  
11                          paragraph;

12                           “(ii) upon the filing of an application  
13                          by an employer under paragraph (3), a  
14                          copy of such application, except that the  
15                          Secretary shall redact any proprietary in-  
16                          formation from such application; and

17                           “(iii) a list (by employer, location and  
18                          occupational classification), compiled on a  
19                          current basis, of the applications filed  
20                          under this subsection. Such list shall in-  
21                          clude the wage rate, number of aliens  
22                          sought, period of intended employment,  
23                          and dates of need.

24                           “(B) MAINTENANCE OF DOCUMENTA-  
25           TION.—The employer shall maintain for at least

1           3 years after the filing of the application or the  
2           employment relationship is terminated, which-  
3           ever is later, documentation evidencing compli-  
4           ance with the conditions in paragraph (3) and  
5           recruitment efforts in paragraph (4).

6           “(10) COMPLAINTS AND INVESTIGATIONS.—

7                 “(A) IN GENERAL.—The Secretary of  
8           Labor shall establish a process for the receipt,  
9           investigation, and disposition of complaints  
10          (which may be filed by any aggrieved person or  
11          organization) respecting an employer’s compli-  
12          ance with this subsection. The Secretary, either  
13          pursuant to this complaint process or otherwise,  
14          may investigate employers as necessary to de-  
15          termine such compliance.

16                “(B) PENALTIES.—If the Secretary of  
17          Labor finds, after notice and an opportunity for  
18          a hearing, a substantial failure to meet any of  
19          the conditions of the application described  
20          under paragraph (2) or (3), a misrepresentation  
21          of a material fact in such application, or a vio-  
22          lation of subparagraph (C)—

23                   “(i) the Secretary of Labor may, in  
24                   addition to any other remedy authorized by  
25                   law, impose such administrative remedies

1 (including civil monetary penalties in an  
2 amount not to exceed \$10,000 per viola-  
3 tion) as the Secretary of Labor determines  
4 to be appropriate; and

5 “(ii) the Secretary of Labor may not  
6 approve applications filed with respect to  
7 that employer under this subsection during  
8 a period of at least 1 year but not more  
9 than 5 years for aliens to be employed by  
10 the employer.

11 “(C) BACK WAGES.—If the Secretary of  
12 Labor finds, after notice and an opportunity for  
13 a hearing, that recovery of back wages, travel  
14 costs, or other fees or costs is necessary to ad-  
15 dress a violation of this subsection or any other  
16 law, the Secretary of Labor may administra-  
17 tively recover such back wages, fees or costs on  
18 behalf of the worker.

19 “(D) DISCRIMINATION OR RETALIATION  
20 PROHIBITED.—It is a violation of this subpara-  
21 graph for an employer who has filed an applica-  
22 tion under this subsection to intimidate, threat-  
23 en, restrain, coerce, discharge, or in any other  
24 manner discriminate or retaliate against an em-  
25 ployee (including a former employee or an ap-



1           plicant for employment) because the em-  
2           ployee—

3                   “(i) has disclosed information to the  
4                   employer, or to any other person, that the  
5                   employee reasonably believes evidences a  
6                   violation of this subsection, or any rule or  
7                   regulation pertaining to this subsection; or

8                   “(ii) seeks legal assistance or counsel  
9                   related to any such violation, or cooper-  
10                  ates, or seeks to cooperate, in an investiga-  
11                  tion or other proceeding concerning the  
12                  employer’s compliance with the require-  
13                  ments of this subsection, or any rule or  
14                  regulation pertaining to this subsection.

15           “(E) AUTHORITY TO ENSURE COMPLI-  
16           ANCE.—The Secretary of Labor is authorized to  
17           take other such actions, including issuing sub-  
18           poenas and seeking appropriate injunctive relief  
19           and specific performance of contractual obliga-  
20           tions, as may be necessary to assure employer  
21           compliance with the terms and conditions of  
22           employment under this subsection. The rights  
23           and remedies provided to workers by this Act  
24           are in addition to, and not in lieu of, any other  
25           contractual or statutory rights and remedies of

1 such workers, and are not intended to alter or  
2 affect such rights and remedies.

3 “(11) OTHER PROTECTIONS.—

4 “(A) PROGRAM VIOLATORS.—An employer  
5 may not be registered under this section if,  
6 within the last 3 years, the Secretary has found  
7 a substantial failure by the employer to comply  
8 with any foreign worker program or the em-  
9 ployer has been found to have willfully, reck-  
10 lessly or repeatedly violated any Federal, State,  
11 or local employment-related law or regulation,  
12 where the result of such violation was the pay-  
13 ment of a fine, backpay damages, or any other  
14 type of penalty in the amount of \$5,000 or  
15 more.

16 “(B) ESTABLISHED WAGES.—If an em-  
17 ployer seeks to appeal a decision of the Sec-  
18 retary of Labor concerning the wages required  
19 to be paid under this section, United States  
20 workers and their representatives shall be given  
21 reasonable opportunity to submit contrary evi-  
22 dence.

23 “(C) ACCESS TO LEGAL SERVICES COR-  
24 PORATION.—Notwithstanding any other provi-  
25 sion of law, the Legal Services Corporation and

1 recipients of its funding may provide legal serv-  
2 ices on behalf of an alien admitted or provided  
3 status as a nonimmigrant described in section  
4 101(a)(15)(H)(ii)(B), except that this subpara-  
5 graph shall not be construed to affect section  
6 292.

7 “(D) TRANSPORTATION COSTS.—The em-  
8 ployer shall pay the transportation costs, in-  
9 cluding reasonable subsistence costs during the  
10 period of travel, for the H–2B nonimmigrant  
11 from the place of recruitment to the place of  
12 employment and from the place of employment  
13 to such worker’s place of permanent residence  
14 or a subsequent worksite.

15 “(E) CAUSE OF ACTION FOR WAGE DIS-  
16 CREPANCIES.—An H–2B nonimmigrant who  
17 fails to receive compensation under the terms  
18 described in the job offer for work provided by  
19 the employer may commence a civil action to  
20 seek back wages in an appropriate district court  
21 of the United States, which shall have jurisdic-  
22 tion over such an action without regard to the  
23 amount in controversy or citizenship of the par-  
24 ties. In a civil action under this subparagraph,  
25 the court may award such nonimmigrant rea-

1           sonable attorney’s fees, including litigation ex-  
2           penses, and costs.

3           “(12) DEFINITIONS.—For purposes of this sub-  
4           section:

5                   “(A) AREA OF EMPLOYMENT.—The term  
6           ‘area of employment’ means the area within  
7           normal commuting distance of the worksite or  
8           physical location where the work of the H–2B  
9           nonimmigrant is or will be performed. If such  
10          worksite or location is within a Metropolitan  
11          Statistical Area, any place within such area  
12          shall be deemed to be within the area of em-  
13          ployment.

14                   “(B) DISPLACE.—In the case of an appli-  
15          cation with respect to one or more H–2B non-  
16          immigrants by an employer, the employer is  
17          considered to ‘displace’ a United States worker  
18          from a job if the employer lays off the worker  
19          from a job that is essentially the equivalent of  
20          the job for which the nonimmigrant or non-  
21          immigrants is or are sought. A job shall not be  
22          considered to be essentially equivalent of an-  
23          other job unless it involves essentially the same  
24          responsibilities, was held by a United States  
25          worker with substantially equivalent qualifica-

1           tions and experience, and is located in the same  
2           area of employment as the other job.

3           “(C) CONSTRUCTION OCCUPATION.—The  
4           term ‘construction occupation’ means any occu-  
5           pation listed as a construction or extraction oc-  
6           cupation in the Department of Labor’s Stand-  
7           ard Occupational Classification, except that it  
8           shall not include any occupation listed in such  
9           classification as an extraction worker occupa-  
10          tion.

11          “(D) FOREIGN WORKER PROGRAM.—The  
12          term ‘foreign worker program’ means any pro-  
13          gram to employ nonimmigrants described in  
14          subparagraphs (H), (J), (L), (O), or (P) of sec-  
15          tion 101(a)(15).

16          “(E) H-2B NONIMMIGRANT.—The term  
17          ‘H-2B nonimmigrant’ means an alien admitted  
18          or provided status as a nonimmigrant described  
19          in section 101(a)(15)(H)(ii)(b).

20          “(F) LAYS OFF.—

21                  “(i) IN GENERAL.—The term ‘lays  
22                  off’, with respect to a worker—

23                          “(I) means to cause the worker’s  
24                          loss of employment, other than  
25                          through a discharge for inadequate

1 performance, violation of workplace  
2 rules, cause, voluntary departure, vol-  
3 untary retirement, or the expiration of  
4 a grant or contract (other than a tem-  
5 porary employment contract entered  
6 into in order to evade a condition de-  
7 scribed in paragraph (1)(E)); but

8 “(II) does not include any situa-  
9 tion in which the worker is offered, as  
10 an alternative to such loss of employ-  
11 ment, a similar employment oppor-  
12 tunity with the same employer at  
13 equivalent or higher compensation and  
14 benefits than the position from which  
15 the employee was discharged, regard-  
16 less of whether or not the employee  
17 accepts the offer.

18 “(ii) CONSTRUCTION.—Nothing in  
19 this subparagraph is intended to limit an  
20 employee’s rights under a collective bar-  
21 gaining agreement or other employment  
22 contract.

23 “(G) REGISTERED H-2B EMPLOYER.—The  
24 term ‘registered H-2B employer’ means an em-  
25 ployer that has been registered by the Secretary

1 of Labor under paragraph (2) to employ an H-  
2 2B nonimmigrant.

3 “(H) STATE WORKFORCE AGENCY.—The  
4 term ‘State workforce agency’ means the agen-  
5 cy designated or authorized under section 4 of  
6 the Wagner-Peyser Act (29 U.S.C. 49 et seq.)  
7 to carry out the State responsibilities under  
8 that Act.

9 “(I) SUBSTANTIAL FAILURE.—The term  
10 ‘substantial failure’ means the repeated, reck-  
11 less or willful failure to comply with the re-  
12 quirements of this section that constitutes a  
13 significant deviation from the terms and condi-  
14 tions of this section.

15 “(J) UNITED STATES WORKER.—The term  
16 ‘United States worker’ means an employee  
17 who—

18 “(i) is a citizen or national of the  
19 United States; or

20 “(ii) is an alien who is lawfully admit-  
21 ted for permanent residence, is admitted as  
22 a refugee under section 207, is granted  
23 asylum under section 208, or is an immi-  
24 grant otherwise authorized, by this Act or

1                   by the Secretary of Homeland Security, to  
2                   be employed.”.

3           (b) CONFORMING AMENDMENTS.—

4                   (1) Section 101(a)(15)(H)(ii)(b) of the Immi-  
5                   gration and Nationality Act (8 U.S.C.  
6                   1101(a)(15)(H)(ii)(b)) is amended by striking “un-  
7                   employed”.

8                   (2) Section 214(c) of the Immigration and Na-  
9                   tionality Act (8 U.S.C. 1184(c)) is amended—

10                           (A) by striking “or 101(a)(15)(H)(ii)(b)”  
11                           from paragraph (5)(A); and

12                           (B) by striking paragraphs (13) and (14).

13                   (3) Section 214(g) of the Immigration and Na-  
14                   tionality Act (8 U.S.C. 1184(g)) is amended—

15                           (A) in paragraph (1)—

16                                   (i) by striking subparagraphs (A) and  
17                                   (B); and

18                                   (ii) by striking “(beginning with fiscal  
19                                   year 1992)—” and inserting “under sec-  
20                                   tion 101(a)(15)(H)(i)(b) may not exceed  
21                                   65,000.”; and

22                           (B) by striking paragraph (10).



1 **SEC. 3. ESTABLISHED WAGE LEVEL.**

2 Section 212(p) of the Immigration and Nationality  
3 Act (8 U.S.C. 1182(p)) is amended by adding at the end  
4 the following:

5 “(5) Notwithstanding the other provisions of this  
6 subsection, in computing the established wage level for an  
7 occupational classification in an area of employment for  
8 purposes of subsection (o)(3)(B)(ii)(II) of this section, the  
9 established wage level shall be determined in accordance  
10 as follows:

11 “(A) If the job opportunity is covered by a collective  
12 bargaining agreement between a union and the employer,  
13 the established wage level shall be the wage rate set forth  
14 in the collective bargaining agreement.

15 “(B) If the job opportunity is not covered by such  
16 an agreement and it is in an occupation that is listed in  
17 a wage determination in the area issued pursuant to a pro-  
18 vision of subchapter IV of chapter 31 of title 40, United  
19 States Code, or the Service Contract Act of 1965 (41  
20 U.S.C. 351 et seq.), the established wage level shall be  
21 at the rate required under the statutory determination.

22 “(C) If the job opportunity is not covered by such  
23 an agreement and it is not in an occupation that is listed  
24 in a wage determination in the area issued pursuant to  
25 a provision of subchapter IV of chapter 31 of title 40,  
26 United States Code, or the Service Contract Act of 1965

1 (41 U.S.C. 351 et seq.), the established wage level shall  
2 be the median of the wage data applicable to such occupa-  
3 tion as published in the Bureau of Labor Statistics' Occu-  
4 pational Employment Statistics survey.

5       “(D) If the job opportunity is not covered by such  
6 an agreement, it is not in an occupation that is listed in  
7 a wage determination in the area issued pursuant to a pro-  
8 vision of subchapter IV of chapter 31 of title 40, United  
9 States Code, or the Service Contract Act of 1965 (41  
10 U.S.C. 351 et seq.), and the employer demonstrates to the  
11 satisfaction of the Secretary of Labor that the Bureau of  
12 Labor Statistics' Occupational Employment Statistics sur-  
13 vey does not sufficiently represent the job opportunity  
14 being petitioned, the Secretary may provide a wage deter-  
15 mination based on the median wage level of wage data  
16 contained in a published wage survey, or wage data con-  
17 tained in a survey that has been conducted or funded by  
18 the employer, provided the Secretary finds that—

19               “(i) such survey meets generally accepted prin-  
20 ciples of survey methodology, including reliability  
21 and viability;

22               “(ii) the population surveyed in such survey is  
23 comprised of at least 51 percent United States work-  
24 ers; and

1           “(iii) such survey meets any other requirements  
2           set by the Secretary of Labor pursuant to regula-  
3           tion.”.

4 **SEC. 4. ESTABLISHMENT OF ACCOUNT AND USE OF FUNDS.**

5           (a) IN GENERAL.—Section 286 of the Immigration  
6 and Nationality Act (8 U.S.C. 1356) is amended by add-  
7 ing at the end the following:

8           “(w) EMPLOYMENT CERTIFICATION APPLICATION  
9 FEE ACCOUNT.—

10           “(1) ESTABLISHMENT OF ACCOUNT.—There is  
11 established in the general fund of the Treasury a  
12 separate account, which shall be known as the ‘Em-  
13 ployment Certification Fee Account’. Notwith-  
14 standing any other provision of law, there shall be  
15 deposited as offsetting receipts into the account  
16 amounts from fees and civil penalties collected under  
17 section 212(o) (except for fees collected under para-  
18 graph (2)(C)(iii)(I) of such section).

19           “(2) USE OF FEES.—

20           “(A) SECRETARY OF LABOR.—Two-thirds  
21 of the amounts deposited into the Employment  
22 Certification Fee Account shall remain available  
23 to the Secretary of Labor until expended for the  
24 costs of Federal and State administration, in-  
25 cluding Federal and State personnel, in car-

1           rying out labor certification activities under sec-  
2           tion 212(o).

3                   “(B) SECRETARY OF HOMELAND SECU-  
4           RITY.—One-third of the amounts deposited into  
5           the Employment Certification Fee Account shall  
6           remain available to the Secretary of Homeland  
7           Security until expended for the administration  
8           of activities under section 212(o).”.

9           (b) REPORT.—Not later than 1 year after the date  
10          of the enactment of this Act, the Secretary of Labor shall  
11          submit a report to the Congress that includes—

12                   (1) the number of complaints received under  
13           section 212(o)(9) of the Immigration and Nation-  
14           ality Act, as added by section 2 of this Act;

15                   (2) the resolution of complaints described in  
16           paragraph (1); and

17                   (3) recommendations, if any, to improve the  
18           process for resolving complaints, including whether  
19           the rights and obligations enumerated by the amend-  
20           ments made by sections 2 and 3 of this Act would  
21           be better enforced if aggrieved persons had access to  
22           a private civil cause of action to effectuate such en-  
23           forcement.

1 **SEC. 5. TRANSFER OF FOREST, CONSERVATION, AND LOG-**  
2 **GING WORKERS TO THE H-2A AGRICULTURAL**  
3 **WORKER PROGRAM.**

4 Any forest, conservation, or logging occupation (as  
5 listed in the Standard Occupational Classification) shall  
6 be considered agricultural labor for the purposes of em-  
7 ploying nonimmigrants described in section  
8 101(a)(15)(H)(ii)(a) of the Immigration and Nationality  
9 Act (8 U.S.C. 1101(a)(15)(H)(ii)(a)), except that such  
10 workers shall continue to be considered seasonal agricul-  
11 tural workers under the Migrant Seasonal Worker Protec-  
12 tion Act (29 U.S.C. 1801 et seq.) notwithstanding any  
13 other provision of law.

○