

2017

## Immigration in the Trump Era: Can American Tourism Survive Without Immigrants?

Mercades White

Follow this and additional works at: <https://lawcommons.luc.edu/pilr>



Part of the [Civil Rights and Discrimination Commons](#), [Criminal Procedure Commons](#), [Environmental Law Commons](#), and the [Human Rights Law Commons](#)

---

### Recommended Citation

Mercades White, *Immigration in the Trump Era: Can American Tourism Survive Without Immigrants?*, 23 Pub. Interest L. Rptr. 68 (2017).

Available at: <https://lawcommons.luc.edu/pilr/vol23/iss1/12>

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Public Interest Law Reporter by an authorized editor of LAW eCommons. For more information, please contact [law-library@luc.edu](mailto:law-library@luc.edu).

## Immigration in the Trump Era: Can American Tourism Survive Without Immigrants?

Mercades White

The legal and political decisions of the Trump administration are affecting a traditionally idyllic part of American society—tourism.<sup>1</sup> The issuance of visas, both for temporary and permanent immigrants, is routine in the United States. In particular, the tourism industry depends heavily on temporary workers.<sup>2</sup> Many tourist towns rely on these temporary workers to fill jobs that Americans see either as undesirable, or are unfit for.<sup>3</sup> Notably, temporary worker visas are utilized for seasonal work such as hotel services, small mom-and-pop stores, and landscaping.<sup>4</sup> Visas are divided into two subcategories: nonimmigrant and immigrant.<sup>5</sup> Nonimmigrant visas, including H-2B visas, are issued for temporary workers and individuals visiting the United States.<sup>6</sup> Immigrant visas are for individuals relocating to the United States permanently.<sup>7</sup> For the fiscal year of 2016, the United States issued 10,381,491 non-immigrant visas and 617,752 immigrant visas.<sup>8</sup>

H-2B visas are subject to an annual quota of 66,000, divided between winter and summer.<sup>9</sup> Temporary workers often secure visas through employer sponsorship.<sup>10</sup> However, the program has been subjected to increased scrutiny under the current administration. President Trump has said, “widespread abuse in our immigration system is allowing American workers from all backgrounds to be replaced by workers brought in from other countries to fill the same job, for, sometimes, less pay.”<sup>11</sup> These claims have received bi-partisan support.<sup>12</sup>

<sup>1</sup> Miriam Jordan, *Visa Shortage Spurs Vacancies, for Jobs, at a Tourist Getaway*, N.Y. TIMES (June 8, 2017), <https://www.nytimes.com/2017/06/08/us/summer-jobs-visas.html>.

<sup>2</sup> Id.

<sup>3</sup> Id.

<sup>4</sup> Id.

<sup>5</sup> Id.

<sup>6</sup> *US Visa Fast Facts*, CNN (Mar. 27, 2017), <http://www.cnn.com/2017/03/23/us/us-visa-fast-facts/index.html>.

<sup>7</sup> Id.

<sup>8</sup> *Temporary Worker Visas*, U.S. DEPT. OF STATE, <https://travel.state.gov/content/visas/en/employment/temporary.html>, (last visited Nov. 12, 2017),

<sup>9</sup> Jordan, *supra* note 1.

<sup>10</sup> Id.

<sup>11</sup> Nicholas Clairmont, *What Will Trump's Executive Order Do to H-1B Visas?*, THE ATL. (Apr. 19, 2017), <https://www.theatlantic.com/business/archive/2017/04/hib-hire-american-trump/523626/>.

H-2B visas exemplify how American society, specifically our workforce, is changing. Changes within the H-2B visa program have made tourist towns economically vulnerable.<sup>13</sup> The “Buy American and Hire American” executive order, issued on April 18, 2017, aimed to “[turn] the Republican Party into a vehicle to broadly represent working-class citizens who felt underrepresented by our political system.”<sup>14</sup> Specifically, the administration segregated the executive order into two categories. The “Buy American” portion of the executive order refers to, “a set of procurement laws about how goods and manufactured products are obtained and how they’re used in federal projects or federally funded projects. . .”<sup>15</sup> The Hire American portion of the executive order, “generally refers to the body of law and policy concerning how our immigration, visa and guest worker programs are operated to ensure proper protections for American workers.”<sup>16</sup> In theory, the “Buy American and Hire American” executive order issued by President Trump is meant to encourage employment of U.S. citizens.<sup>17</sup> However, the executive order has not led to an increase of employment in these economically vulnerable areas.<sup>18</sup>

#### HISTORY OF THE H-2B VISA PROGRAM

The Immigration Nationality Act of 1952 permitted a temporary work visa program<sup>19</sup> and forged the pathway for H-2B visas.<sup>20</sup> The 1952 statute amended the Immigration Act of 1924, which instituted an immigration selection system.<sup>21</sup> The original system allocated “one-sixth of one percent of each nationality’s population within the United States”, which resulted in a substan-

<sup>12</sup> Fred Beyer, *With Fewer Available H-2B Visas, Employers Struggle To Find Seasonal Workers*, NPR (Mar. 28, 2017), <http://www.npr.org/2017/03/28/520254684/with-fewer-available-h-2b-visas-employers-struggle-to-find-seasonal-workers>.

<sup>13</sup> Jordan, *supra* note 1.

<sup>14</sup> *Background Briefing on Buy American, Hire American Executive Order*, OFFICE OF THE PRESS SECRETARY WHITE HOUSE, (Nov. 12, 2017), <https://www.whitehouse.gov/the-press-office/2017/04/17/background-briefing-buy-american-hire-american-executive-order>.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Press Briefing, The White House Office of the Press Sec’y, *Background Briefing on Buy American, Hire American Executive Order* (Nov. 12, 2017), <https://www.whitehouse.gov/the-press-office/2017/04/18/presidential-executive-order-buy-american-and-hire-american>.

<sup>18</sup> Jordan, *supra* note 1.

<sup>19</sup> *The Immigration and Nationality Act of 1952 (The McCarran-Walter Act)*, OFFICE OF THE HISTORIAN, [history.state.gov](http://history.state.gov) (Last visited Dec. 16, 2017).

<sup>20</sup> Jordan, *supra* note 1.

<sup>21</sup> *The Immigration and Nationality Act of 1952*, *supra* note 18.

tial number of program participants of western European heritage.<sup>22</sup> President Truman disfavored this outcome due to its adverse effects on Asian immigrants and vetoed the legislation, but despite this the legislation passed through Congress.<sup>23</sup> This legislation ultimately paved the way for our current immigrant visa system.

### POLITICAL EVOLUTION SURROUNDING H-2B VISAS

In 2005, the Department of Labor and Department of Homeland Security proposed joint changes to the H-2B visa program.<sup>24</sup> These changes “would have eliminated in whole the Department’s adjudicatory role, ending the current labor certification process for most H-2B occupations and permitting employers to submit labor-related attestations directly to USCIS as part of a revised Supplement accompanying the H-2B petition.”<sup>25</sup> In 2008, the Department of Labor mandated that an employer applying for H-2B visas to fill vacancies must demonstrate a need for temporary services or labor.<sup>26</sup> The employment needs of a business must fall into one of four categories; “(1) A one-time occurrence; (2) a seasonal need; (3) a peakload need; or (4) an intermittent need.”<sup>27</sup> Additionally, the 2008 Final Rule implemented an attestation-based filing model that allowed employers to recruit workers without Federal or State oversight.<sup>28</sup> The Final Rule of 2008 was partially invalidated due to ambiguous definition of “full-time” and failing to specify when employers were to contact labor unions about the source of labor.<sup>29</sup>

In 2012, the Department of Labor issued official new regulations surrounding the H-2B visa program.<sup>30</sup> Specifically, these regulations addressed the portions of the Final Rule of 2008 that were invalidated in *Comité de*

---

<sup>22</sup> Id.

<sup>23</sup> Id.

<sup>24</sup> Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes, 73 FR 29942-01.

<sup>25</sup> Id.

<sup>26</sup> Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 77 FR 10038-01(2008).

<sup>27</sup> Id.

<sup>28</sup> Id.

<sup>29</sup> *Comite De Apoyo A Los Trabajadores Agricolas v. Solis*, No. CIV.A 09-240, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010).

<sup>30</sup> Temporary Non-Agricultural Employment of H-2B Aliens in the United States, *supra* note 23.

*Apoyo a los Trabajadores Agrícolas (CATA) v. Solis*.<sup>31</sup> *CATA v. Solis* involved a reforestation business that claimed to be adversely effected by the new regulations implemented by the Department of Labor.<sup>32</sup> The challenged regulations aimed to increase employer liability to protect and ensure fair wages and working conditions for both American and foreign workers. Additionally, these regulations expanded worker recruitment requirements.<sup>33</sup> However, in 2015, *Bayou Lawn v. Perez* challenged these new regulations by claiming the Department of Labor did not have authority to issue them.<sup>34</sup> The Court ultimately struck down these provisions.<sup>35</sup> Judge Casey Rodgers found that under the Immigration Nationality Act of 1952, the Department of Labor lacked authority to implement the proposed regulations.<sup>36</sup> Ultimately, the cap on H-2B visas remained the same at 66,000 annually.<sup>37</sup>

#### H-2B VISA PROGRAM UNDER THE TRUMP ADMINISTRATION

The present-day H-2B visa program allows immigrants to utilize the visas for temporary non-agricultural work.<sup>38</sup> These visas are heavily used in the tourism industry.<sup>39</sup> Immigration attorney Jennifer Bennett contends that it is necessary for American employers to fill these temporary jobs to stay in business.<sup>40</sup> During her ten years of experience, Ms. Bennett has observed that American workers may be available and qualified to fill these jobs, but they are oftentimes unwilling to accept temporary work.<sup>41</sup> However, the Trump campaign and eventual administration perpetuated an anti-immigration narrative.<sup>42</sup> This led to claims from President Trump that he would substantially cut legal immigration, specifically immigration from Mexico, and construct a wall

<sup>31</sup> *Comite De Apoyo A Los Trabajadores Agrícolas v. Solis*, *supra* note 26.

<sup>32</sup> *Id.*

<sup>33</sup> Temporary Non-Agricultural Employment of H-2B Aliens in the United States, *supra* note 23.

<sup>34</sup> *Bayou Lawn & Landscape Servs. v. Sec'y, U.S. Dep't of Labor*, 621 F. App'x 620 (11th Cir. 2015).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Jordan, *supra* note 1.

<sup>38</sup> *Temporary Worker Visas*, *supra* note 8.

<sup>39</sup> Jordan, *supra* note 1.

<sup>40</sup> Email interview with Jennifer Bennett, Attorney, Law Office of Jennifer L. Bennett, (Nov. 10, 2017).

<sup>41</sup> Email interview with Jennifer Bennett, *supra* note 41.

<sup>42</sup> Philip Klinker, *Anti-Immigration views helped Trump win. Will they also cause his undoing?*, CHI. TRIB., (Apr. 18, 2017) <http://www.chicagotribune.com/news/opinion/commentary/ct-trump-supporters-anti-immigrant-20170418-story.html>.

on the southern border of the United States.<sup>43</sup> This anti-immigration rhetoric led to a Congressional vote against renewing a provision of the H-2B visa program that, allows previous H-2B visa workers to be excluded from the quota.<sup>44</sup> By failing to renew this provision, Congress cut the number of H-2B visas by fifty percent.<sup>45</sup>

Congressional inaction also changed the environment surrounding immigration cases. Immigration cases, both employment and family based, have undergone heightened scrutiny because they do not coincide with the sentiment embodied in the “Buy American Hire American” executive order.<sup>46</sup> Specifically in immigration employment cases, the federal government is increasing the issuance of “RFE’s”, also known as Request for Evidence, as well as “NOID’s” (Notice of Intent to Deny).<sup>47</sup> RFE’s and NOID’s target and scrutinize employment cases and demand a significant amount of additional time, money, and resources.<sup>48</sup>

The Congressional decision to not renew the benefit for returning workers proved to have economic effects at the state level as well.<sup>49</sup> Numerous Congressional representatives urged the Trump Administration and Congress to offer a solution.<sup>50</sup> For example, Alaska’s \$5.8 billion seafood industry suffered immensely due to the changes to H-2B visas, prompting Senator Lisa Murkowski to ask for an “urgently needed” solution.<sup>51</sup> Likewise, the governor of Maine, Paul R. LePage, moved to conditionally commute prison sentences of low-level offenders to fill the shortages left by the H-2B visa program.<sup>52</sup> These drastic measures highlighted not only the importance of H-2B visas, but also the economic necessity of the program. It is clear through the utilization of this program that many Americans do not desire to fill these jobs, thus invalidating President Trump’s, “Buy American and Hire American” executive order.<sup>53</sup>

---

<sup>43</sup> Id.

<sup>44</sup> Jordan, *supra* note 1.

<sup>45</sup> Id.

<sup>46</sup> Email interview with Jennifer Bennett, *supra* note 41.

<sup>47</sup> Id.

<sup>48</sup> Id.

<sup>49</sup> Jordan, *supra* note 1.

<sup>50</sup> Id.

<sup>51</sup> Id.

<sup>52</sup> Id.

<sup>53</sup> Labor, Immigration, & Emp. Benefits Div., U.S. Chamber of Commerce, *The Economic Impact of H-2B Workers* (2010), [https://www.uschamber.com/sites/default/files/legacy/reports/16102\\_LABR20H2BReport\\_LR.pdf](https://www.uschamber.com/sites/default/files/legacy/reports/16102_LABR20H2BReport_LR.pdf), (Nov. 12, 2017).

However, H-2B is not without its problems. The manner in which the H-2B visa program is conducted is often burdensome and cumbersome to taxpayers, U.S. employers, and foreign workers.<sup>54</sup> Frequently the application process does not gather all the necessary information submitted by U.S. employers.<sup>55</sup> This repeatedly leads to unnecessary delays during processing, and ultimately wastes government resources.<sup>56</sup> The “Buy American and Hire American” executive order does not address these bureaucratic issues, rather it exacerbates these challenges by simply attacking the overall H-2B temporary worker visa program.<sup>57</sup> As a result of the Trump campaign’s anti-immigration rhetoric, the tourism industry is at risk for what the administration referred to as, “irreparable harm”.<sup>58</sup> Ultimately the administration chose to increase the cap of H-2B visas from 66,000 to 81,000.<sup>59</sup> Unsurprisingly, this undercut the initial executive order, and campaign promise, of hiring American workers over legal immigrants.

---

<sup>54</sup> Email interview with Jennifer Bennett, *supra* note 41.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> Press Briefing, The White House Office of the Press Sec’y, *supra* note 16.

<sup>58</sup> Alexia Fernandez Campbell, *Trump Lifted The Cap on H-2B Worker Visas*, VOX (July 20, 2017) <https://www.vox.com/policy-and-politics/2017/7/20/16003254/trump-h2b-visa-program>

<sup>59</sup> *Id.*

The *Public Interest Law Reporter* (PILR) is an innovative legal publication that focuses on current issues in public interest law and policy. Founded in 1995, PILR provides students, educators, and practitioners with information about, and thoughtful analysis of, contemporary issues in the area of human rights, economic equity, criminal justice, the environment, and both small and large-scale governance. The publication is produced, managed, and edited by Loyola Law students. Staff writers are selected through a write-on process and collaborate with editors to determine specific areas to research and write about. Feature articles provide more in-depth exploration of some particularly poignant or difficult issues. Additionally, selected articles from contributing authors are accepted for publication.

**Editor in Chief**

William Ryan

**Executive Editors**

Mallory Barret

Alexandra Lehr

**Articles Editors**

Kristine Ruhl

Gabriella Fontan

**Staff Writers**

Joseph Camper

Fabiola De Armas

Jennifer Straka

Maha Sadek

Jon Santiago

Michelle Tinajero

Mercades White

**Faculty Advisor**

Professor Henry Rose