

We ❤️ Foreign

Many seasonal businesses lean toward hiring



HARD AT WORK:
Lobster picking in
Saco, Maine

Workers

visa-holders over Americans



By SHAWN ZELLER

Immigration policy has roiled the body politic in Washington for years, and especially since Donald Trump's 2016 campaign. In Washington's partisan wars, rarely hotter than they are now, it's at the very center.

Republicans and Democrats have found little common ground on the issue, but they have found some.

A rare moment of comity came in March when 11 senators wrote to then-Homeland Security Secretary Kirstjen Nielsen asking her to increase the number of visas for unskilled guest workers who toil in America's seasonal industries, from seafood processing to resort housekeeping.



The senators, an ideologically and geographically diverse group led by the two from Maine, Republican Susan Collins and independent Angus King, argued that labor shortages were making it impossible to find workers and that businesses in their states "could be forced to curtail operations."

Nielsen agreed and Homeland Security boosted the number of H-2B visas by almost 50 percent, to nearly 100,000 for the year. And Trump's assent, despite pledges to help American workers with his hard line on immigration, was in keeping with administration policy.

The president, who uses H-2B workers at his Florida Mar-a-Lago resort, has increased the number of visas available in every year of his first term, and this year will hand out more than at any time since 2007. The 2019 total figures to be higher than all but two years, 2006 and 2007, since at least the late 1980s.

That some parts of the country, and some employers, cannot find sufficient numbers of workers is undoubtedly true. Many of the jobs are in remote areas, and much of the work is hard and boring. But critics of the program



FAIR EMPLOYMENT: A carnival game worker waits for customers during the Iowa State Fair in Des Moines. Jobs like these are often filled by immigrants with temporary visas.

Replogle, a former aide to John Thune of South Dakota, who is now the second-ranking Republican in the Senate, and to Lamar Alexander, the Tennessee Republican who chairs the Senate panel that oversees the Labor Department. Gregg Hartley, a one-time chief of staff to Missouri GOP Sen. Roy Blunt, now the Senate Republican Policy Committee chairman, is working on behalf of seasonal employers.

On the Democratic side, a former chief of staff to New Mexico Sen. Tom Udall, Thomas W. Nagle, now lobbies on H-2Bs for employers. Scott McGee, a former aide to Alexis Herman, a Labor secretary under President Barack Obama, works on behalf of the carnival industry on the issue.

In years past, some of the most passionate defenders of the program on Capitol Hill have been liberal Democrats, such as former Sens. Edward M. Kennedy of Massachusetts, who advocated for the Cape Cod hospitality industry, and Barbara A. Mikulski of Maryland, who curtailed Labor Department audits of Chesapeake Bay seafood processors.

On April 8, employers organized by the Seasonal Employment Alliance, a lobbying group for industries that use H-2B workers, stayed at the Trump International Hotel by the White House, then rallied the following day at the Capitol before spending the rest of the day lobbying their representatives. Republicans Bob Gibbs and Bill Johnson of Ohio, Denver Riggleman of Virginia, Ann Wagner and Billy Long of Missouri, Andy Harris of Maryland, Lee Zeldin of New York, and Jack Bergman of Michigan spoke to the group.

"If you have seasons, you need seasonal workers," Harris told the employers. "We are not going to get Americans to do the jobs nor should we expect Americans to do highly seasonal work."

The employers are hoping Congress will now act. "We had to thank the administration for the additional visas, but also called on

— an equally diverse group that includes immigration restrictionists and pro-labor advocates — argue, convincingly, that the H-2B program opens too wide a door to foreign guest workers, hurting Americans seeking work or higher wages. The consequences, they say, also extend to visa holders, who in some cases are mistreated and cheated by their U.S. employers.

Certainly, the 100,000 or so visas that the U.S. will grant this year don't seem like much in a workforce of 160 million. But H-2Bs are only a subset in a much broader array of visa programs, which share similar problems.

The H-1B offers 85,000 technology workers entrance. The J-1 visa gives around 300,000 foreigners, 86 percent of whom are under the age of 30, the chance to come to the United States to work at theme parks, restaurants and summer camps in the name of "cultural exchange." There is no cap on the number of H-2A visas, for agricultural workers, and U.S. farmers are employing more than 200,000 a year.

"The workers that come in need to be paid fairly and they need to have equal rights and

protections," says Daniel Costa, director of immigration law and policy research at the Economic Policy Institute, a think tank with ties to the U.S. labor movement. "Unfortunately, the H-2B program doesn't have that."

Foreign Aid

Companies that use H-2B workers insist they try hard to recruit Americans first, and that the Labor Department requirement to pay a prevailing wage to their foreign workers proves the point. What incentive would they have to prefer foreigners?

But the employers' behavior signals that they often do. Landscaping companies, seafood processors, amusement parks and carnivals, hotels and restaurants, among others, have assembled an expansive lobbying operation in Washington and have repeatedly convinced Congress to curtail the Labor Department's enforcement of requirements that employers advertise their jobs and offer pay and benefits to U.S. workers on the same terms as those offered foreign workers.

They have enlisted lobbyists with ties to lawmakers of both parties, including Stephen

(Previous page) Edwin Remsberg/AP; Justin Sullivan/Getty Images

Congress to reform the program permanently,” says Gray Delany, executive director of the alliance. By reform, Delany says his members would like Congress to provide an unlimited number of visas to meet employer needs.

More realistically, they’d support revival of an effort by two Republicans last year, Harris in the House and Thom Tillis of North Carolina in the Senate, to increase the number of H-2B visas each year to 132,000. In exchange, employers would have to take additional steps to check the immigration status of their workers and pay fees to support a Labor Department job registry aimed at U.S. workers.

Employers, during the current semi-annual cycle, have won Labor certifications for about 82,000 visas, Delany says, but won’t be able to fill about 20,000 of those jobs. That’s because the typical annual cap of 65,000 is divided into semi-annual allotments. On top of that Trump is providing 30,000 more for the current season.

Snubbing Americans

The employers’ lobbyists have convinced lawmakers and the Trump administration that labor shortages exist, but there is little hard evidence to prove they do, or at least that they are as widespread as claimed. Meanwhile, advocates for U.S. workers point out that the employers have, in many cases, sought H-2Bs in areas of relatively high unemployment while putting up hurdles for Americans seeking jobs, insisting that they have prior experience for jobs that wouldn’t seem to require any, along with clean criminal records and no history of drug abuse.

In comments filed with the Labor Department in December on its proposal to change the rules governing how employers must first recruit U.S. workers, a number of U.S. labor groups and immigrant advocates pointed out that employers were requesting workers with experience in nearly half of job listings for dishwashers and in more than 40 percent of listings for dining room and cafeteria attendants and bartender helpers, for example.

“The purpose of that is to refuse U.S. workers an entry-level job,” says Arthur Read, the general counsel of Justice at Work, a group that provides legal assistance to H-2B workers.

Prior experience requirements hurt young workers the most and it seems likely that the increase in the use of H-2Bs and other visa

programs have contributed to the declining rate of labor force participation among American youth.

Economists have struggled to explain the drop in America’s overall labor force participation rate, the percentage of Americans working or looking for work. It has declined from its 2000 peak of 67.3 percent, plummeting after the Great Recession of 2007-09 to a low of 62.4 percent in 2015 before rebounding slightly last year to 63 percent. But it pales in comparison to the decline in the number of young people, aged 16-24, in the labor force. That number peaked in the summer of 1989 at 77.5 percent. Last summer, it was at 60.6 percent.

If H-2B employers were required to recruit nationally, it might help. It’s easy to imagine that employers in some industries — the resort, restaurant and hotel business, for example — might find youth willing to move across the country to spend a summer on Nantucket as a waiter, or in the winter, manning a Colorado ski lift, provided the employers offered reimbursement for their travel and housing on the same terms offered to their foreign workers. But now, they have the government’s permission to turn to the H-2B program before seeking workers from other parts of the country.

The H-2B program also hurts older Americans. Despite a national unemployment rate of 3.6 percent, those without a high school degree are significantly more likely to be un-

employed, as evidenced by their national unemployment rate of 5.4 percent. And overall unemployment rates still exceed 5 percent in many parts of the country, from Spokane, Wash., where 5.8 percent are looking for work, to El Centro, on California’s inland border with Mexico, where it’s 16.2 percent. The Labor Department has designated scores of “labor surplus areas” in the country where the unemployment exceeds the national rate by at least 20 percent.

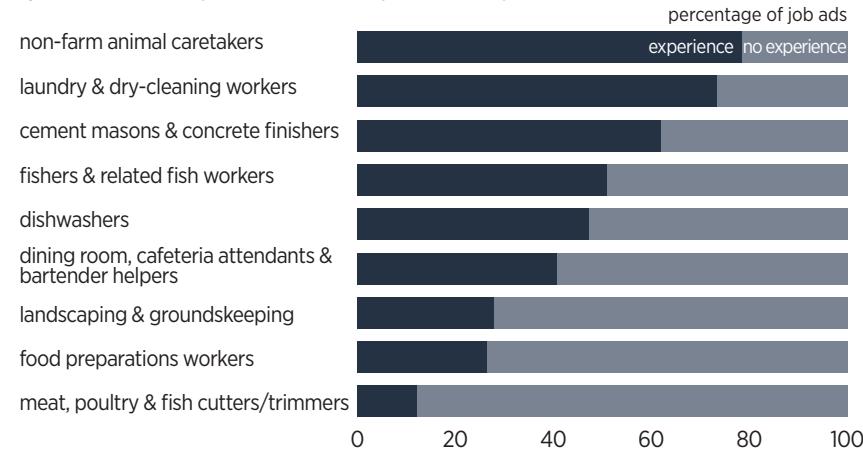
Delany says employers often do recruit outside their regions, but face frustration when they hire U.S. workers and pay their travel costs only to see them quit before the season is over.

But critics of the H-2B program note that, despite language in the governing legislation requiring employers to conduct broad job searches, Labor’s regulations only demand that employers first seek to hire Americans in their vicinity. The regulations are out of another era. An employer need only place a print advertisement on two separate days, one of which must be a Sunday, in a newspaper of general circulation serving the area of intended employment.

The Homeland Security and Labor departments in November proposed to update that requirement, asking an employer instead to advertise on a website serving its local area, or on sites that list jobs specific to the employer’s industry, while allowing employers to stop advertising in newspa-

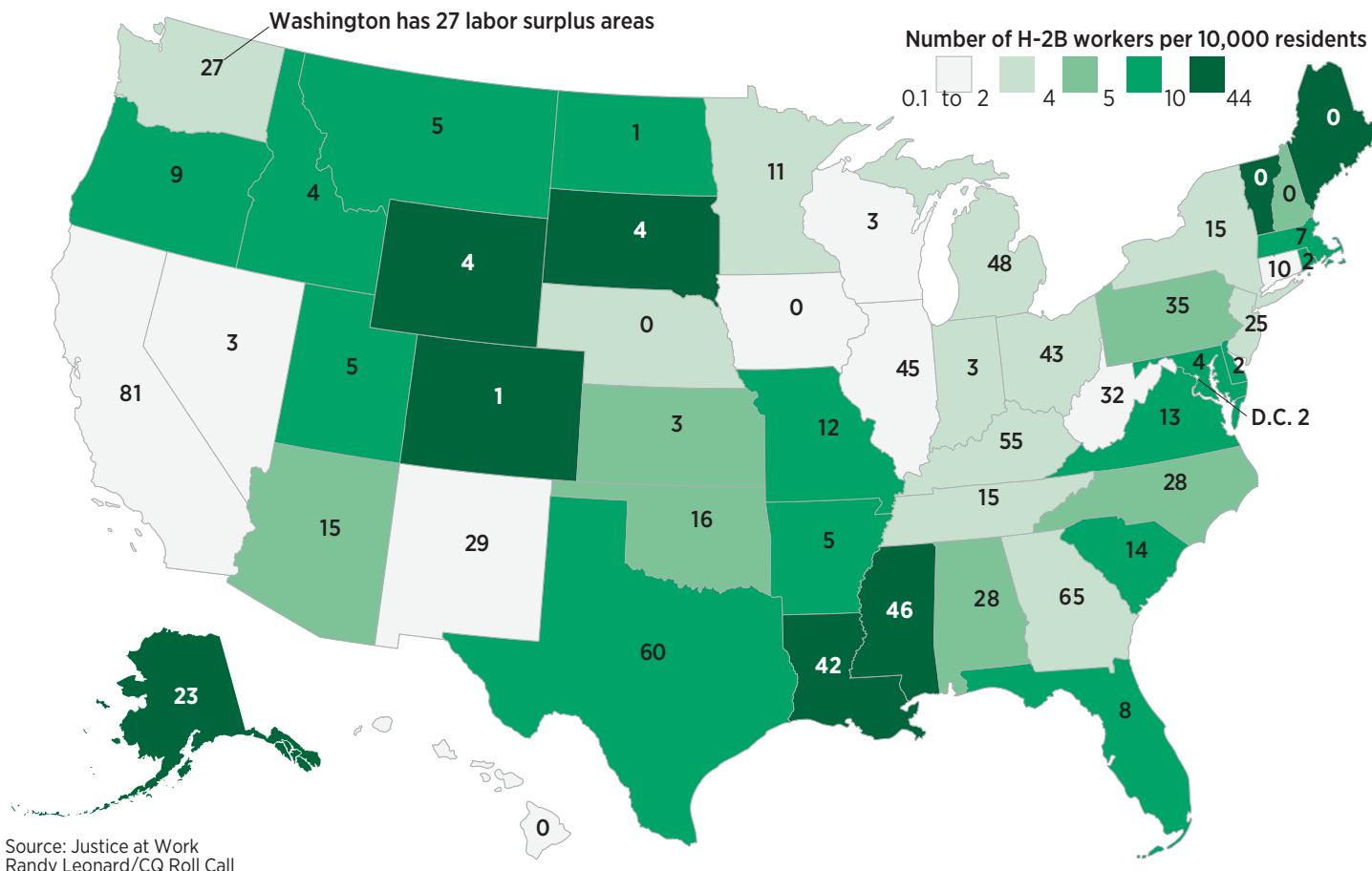
Experienced unskilled workers needed

Employers who ultimately turned to foreign workers last year often asked for job experience when they advertised to U.S. workers positions deemed by the Labor Department to require no experience.



Source: Justice at Work
Jason Mann/CQ Roll Call

States utilizing H-2B workers



pers. It's clear that more job-related mobility would assist people in areas hard hit by industrial decline, but the proposed rules still wouldn't require national job searches.

In their comments on the proposal, U.S. labor groups and immigrant advocates — including UNITE HERE, a union for hotel and restaurant workers, and the Southern Poverty Law Center — argued that the proposal, which has yet to be finalized, "fails to take into account differences in internet accessibility and technical skill, current patterns of job search and employment in particular occupations, and other proven, successful recruitment methods."

The proposed rules, however, might be an improvement over the current ones.

The labor and immigrant rights groups studied the issuance of H-2B visas and found thousands were granted in or in close proximity to areas Labor has deemed to have labor surpluses. Texas, for example, routinely leads the list of states in the number of H-2B workers even as the state, as of last year, had 60 jurisdictions deemed

to have a labor surplus, including areas around Houston and Brownsville.

Close to Washington, a city with a labor surplus, Labor has recently certified more than 1,000 H-2B workers in Prince George's County, Md., while it has certified nearly 2,000 in close proximity to Baltimore, which also has surplus labor.

In those areas, workers with prior criminal records or a history of drug abuse may want to work, but job listings discourage them, says Read: "Why is it that anyone with a criminal record should not be hired for a landscaping job? The real purpose is to discourage people from applying for jobs." He notes that it's unlikely employers are paying attention to criminal records or drug histories of their foreign hires.

Easy to Be Hard

Theoretically, there is no financial incentive for employers to favor foreign workers. The Labor Department requires that H-2B employers pay for the travel costs of their guest workers and that they offer them wag-

es commensurate with what other workers doing similar jobs in the area pay.

Evidence of cheating, however, is rampant, as detailed in an "investigative advisory report," from the Labor Department's inspector general, Scott S. Dahl, in January. Dahl detailed fraud schemes in which H-2B workers are denied the prevailing wage, asked to work in areas outside the one for which the employer claimed a labor shortage, or in which employers have brought in surplus foreign workers and then shopped them out to other businesses. Dahl recommended that the department tighten its process for certifying employers' labor needs.

"The labor protections built into these programs are really weak," says Jayesh Rathod, director of the Immigrant Justice Clinic at American University's Washington College of Law. "Let's be honest. If you wanted to work the system, you know how to work the system."

But even when employers comply, the requirement that they offer only the prevailing wage contributes to the wage stagnation that

has especially afflicted low-skilled Americans, as it eliminates the need for employers to raise wages just as they're feeling pressure to do so.

The Pew Research Center reported last year that despite near-record unemployment, wage growth in the United States has continued to lag economists' expectations. Pew found that today's average wage, accounting for inflation, has about the same purchasing power it did 40 years ago.

Despite Labor Department requirements that employers pay H-2B workers the prevailing wage in their area, the reality is they often earn less than the average worker in the industry makes. Using Labor's own data, Costa has tallied wages of H-2B workers in 20 job categories, from baristas to roofers, and found that the H-2B workers earned less in 17 of them.

Employers have found ways to game the system. In 2013, for example, when the Labor and Homeland Security departments aimed at boosting pay for H-2B workers by tightening rules for adhering to government wage surveys, employers exploited a loophole allowing them to conduct their own wage surveys. After the rule came out, employers boosted their use of private surveys by 3,182 percent, Bloomberg BNA reported at the time.

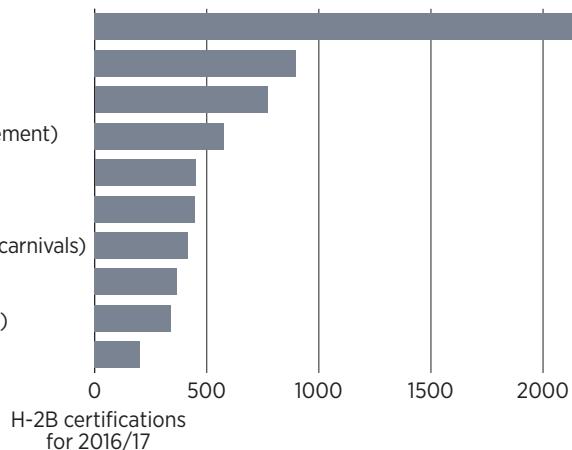
Some in the carnival industry, inventively, saved wages by taking advantage of another loophole, allowing employers to pay a wage agreed to through collective bargaining. An American recruiter of Mexican workers for carnivals formed the Association of Mobile Entertainment Workers, which then reached agreement with carnival operators on wages. A labor advocacy group in Pennsylvania brought a case to the National Labor Relations Board in 2014 alleging that the union had conspired with carnival operators to keep wages down. The operators have agreed to back pay as part of a settlement agreement.

In 2015, Homeland Security and Labor attempted to close the loophole permitting private wage surveys to govern H-2B pay, allowing them only when Labor does not have its own survey, or when the survey is conducted by a state government entity. But Congress quickly stepped in to block enforcement of the rule in its fiscal 2016 omnibus appropriations law, ordering Labor to accept private wage surveys except in cases where it deter-

Employers and their guest workers

Firms, many with recognizable names, rely on seasonal foreign labor in industries from landscaping to resort hospitality.

Brightview Landscapes, Penn. (landscaping)
 Alpha Services, Idaho (forestry management)
 Icicle Seafoods, Wash. (seafood processing)
 American Pool Enterprises, Md. (pool management)
 Vail Corp., Colo. (skiing)
 Grand Hotel, Mich. (resort)
 North American Midway Entertainment, Ind. (carnivals)
 Boca West Country Club, Fla. (resort)
 Six Flags Great Adventures, N.J. (theme parks)
 Wequasset Inn, Mass. (resort)



Source: Center for Immigration Studies
 Jason Mann/CQ Roll Call

mined the methodology to be unsound.

Further underscoring doubts about Congress' loyalties, that law also barred Labor from enforcing requirements that H-2B employers pay their U.S. workers as much as their foreign ones, and from auditing employers' applications for H-2B workers, or assisting employers in finding U.S. workers.

Lax Oversight

Labor is also undermanned and perhaps under-motivated in its oversight of employers' treatment of H-2B workers.

Most of the workers come from Mexico, where a thriving industry of H-2B recruiters matches workers with U.S. employers. Though they aren't supposed to charge the workers fees, they sometimes do. The workers then arrive in the United States in debt or eager to recoup the money.

The foreigners' jobs are tied to their visas and they cannot seek new jobs in the United States or quit. If they do, they must return to their home countries. As a result, they are reluctant to speak up when their employers break the rules or mistreat them.

Those who complain about mistreatment from U.S. employers may find themselves and their families blackballed by the recruiters in their home countries. And those willing to speak out when they are ripped off can have difficulty finding U.S. lawyers to represent them. Congress has barred lawyers who receive Legal Services

Corporation funding from representing H-2B workers. (Congress created the corporation in 1974 as an independent nonprofit to aid low-income Americans.)

Even so, some employers break the rules and get caught. Last fall, for example, the Labor Department discovered a landscaping firm in Robbinsville, N.C., Lovin Contracting, underpaying its H-2B workers and refusing to pay their travel costs. The company agreed to pay \$1.28 million to 231 employees it had cheated. Last spring, Labor hit Metropolitan Concrete, a Michigan firm, with nearly \$103,000 in penalties for similar violations. And in February 2018, it required The Chicken or The Egg restaurant in Beach Haven, N.J., to pay nearly \$8,000 to two H-2B workers it had underpaid.

The department announced last year it had identified more than \$105 million in back wages for more than 97,000 workers in industries with a high prevalence of H-2B workers and it launched an outreach initiative to landscaping and hotel employers in an effort to bolster compliance with the rules. Edwin Nieves, a Labor spokesman, declined an interview request about the department's enforcement efforts.

There are worrisome signs that those efforts are flagging. For example, there currently are just 11 employers debarred from hiring H-2B workers for violations of program rules, or for failing to respond to government auditors. As recently as 2015, the list totaled 35.



WELCOME MAT:
Trump, who often hires foreign workers at his Mar-a-Lago Resort, has increased the cap on H-2B visas every year since he became president.

Not Heard on the Hill

Congress hasn't made the department's job easy, nor has it heeded the advice of advocates for workers, both foreign and American, who've suggested new safeguards.

The Economic Policy Institute's Costa has proposed tasking the government with responsibility for declaring labor shortages in certain industries or regions, and tying the availability of H-2B visas to them.

Centro de los Derechos Del Migrante, an immigrant rights' group, suggests that Congress hold employers liable when H-2B workers are charged recruitment fees, a common, albeit illegal practice. It also suggests making jobs between H-2B workers and employers enforceable contracts.

American University's Washington College of Law, along with Centro de los Derechos Del Migrante, has proposed permitting H-2B workers to switch jobs in the United States, while Justice at Work, which also assists H-2B workers, has suggested that the workers be granted longer-term work visas — H-2Bs are good only for one season — that allow them to come to the United States with their families.

Groups like the Center for Immigration Studies, which favors stricter immigration controls, want the government to assist employers by establishing a domestic program matching willing workers from across the country with employers.

"The way I think about a tight labor market is that this is a great opportunity for us

to bring people who otherwise wouldn't be working into jobs," says Preston Huennekens, a former research associate at the center who recently joined another hardline group, the Federation for American Immigration Reform. He suggests that employers be more open to hiring ex-convicts, recovering drug addicts and the homeless.

In the absence of action in Washington, critics of the H-2B program are pressing states to protect workers. In 2014 they were successful in convincing the California legislature to pass a law requiring labor recruiters to register with the state as a way of holding them

accountable if H-2B workers are cheated. Maryland saw introduction of a similar bill in its last session.

The Labor Department also keeps a list of foreign labor recruiters that it compiles from information employers provide in requesting visas. It says that the list will help foreign workers "verify whether a recruiter is in fact recruiting for legitimate H-2B job opportunities in the United States." But at the same time, the department says it cannot guarantee that is true. It warns that "The department does not endorse or vouch for any foreign labor agent or recruiter included in the Foreign Labor Recruiter List, nor does inclusion on this list signify that the recruiter is in compliance with the H-2B program."

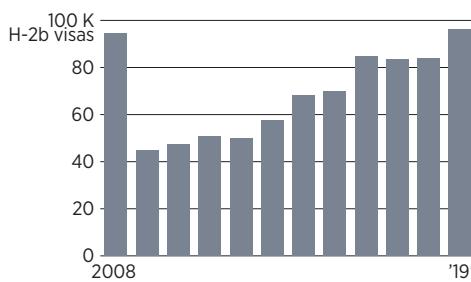
So advocates for the immigrants are trying to ensure they are informed of their rights and the dangers they face, and that they can help each other. Centro de los Derechos Del Migrante, for example, has started a website where H-2B workers can share their experiences with specific employers and recruiters, a Yelp of guest working.

Such efforts have helped both U.S. and foreign workers, says American University's Rathod, but only at the margins.

"What is it about this program that employers are so drawn to?" he says. "They want a compliant workforce that, with the help of recruiters, just shows up when you need them, and where their whole status is contingent on your satisfaction." ■

Guest workers increase

After dipping following the 2007-09 recession, the government has allowed increasingly more seasonal guest workers.



* Increase in cap; total figures not yet available, but visas have exceeded the cap since 2013.

Source: State Department
Jason Mann/CQ Roll Call