

H-2B Program in Chaos: DOL's Overreach Leads to halt on most Petitions

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The H-2B visa program allows U.S. employers to bring foreign workers to the United States to perform temporary, unskilled, and non-agricultural work. Warm-weather employers across the country—including park districts, amusement parks, and landscaping companies—rely upon the program to fill out their annual workforce. As of March 22, 2013, however, for reasons explained below, the U.S. Citizenship and Immigration Service (USCIS) has completely halted the processing of most new H-2B petitions.

The stoppage can be traced back to a 2008 decision by the U.S. Department of Labor (DOL) to change its system of calculating “prevailing wages” for H-2B workers. (As part of an H-2B petition, each employer must prove to the DOL that its H-2B workers will be paid the prevailing wage for their position.) Specifically, in December 2008, DOL adopted a new method of calculating prevailing wages that involved four wage “tiers” that correspond to four different “skill levels” for each position. A federal district court subsequently invalidated that four-tier system based on procedural errors by the DOL, and ordered the DOL to implement a new prevailing wage methodology. Therefore, in January 2011, the DOL proposed a *different* prevailing wage system, which received overwhelming criticism from employers. As a result of employers’ comments, Congress has delayed implementation of the rule by repeatedly denying DOL funding its implementation.

During this ongoing period of delay, DOL has continued to adjudicate H-2B petitions by using the four-tier system previously found insufficient by the courts. On March 21, 2013, however, the same federal court that originally ruled on the four-tier system issued a new ruling stating that the DOL was required to cease using the four-tier system *immediately*. Therefore, the Department of Labor now finds itself in a position where it can use neither the 2008 rule (now vacated by the courts) nor the 2011 rule (now effectively enjoined by Congress). As a result, both the DOL and USCIS announced in early April 2013 that they are putting on hold all H-2B petitions that require a prevailing wage determination from the DOL. (H-2B petitions using wage determinations based on bargaining agreements, private surveys, or the Davis Bacon Act are not affected.) Within 30 days, the DOL is expected to issue a new rule to support prevailing wage calculations.

As a result of these developments, employers who rely upon H-2B labor or who are looking to utilize H-2B labor in the near future should contact counsel to identify potential alternatives to the H-2B program for the time being.

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