



Building Better Outcomes

# CONSTRUCTION CLAIMS

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## P3 PUBLIC- PRIVATE PARTNERSHIPS

LAWYERS CAN TAKE CUES FROM THE INTERNATIONAL  
MARKET WHEN FACED WITH INCREASINGLY COMPLICATED  
U.S. INFRASTRUCTURE CONTRACTS. P. 26

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HARVEY



# GROWING DEMAND

WILL THE UNITED STATES HAVE ENOUGH CONSTRUCTION  
WORKERS TO REPAIR THE SOUTH AFTER THIS HURRICANE  
SEASON, OR WILL CONTRACTORS TURN TO H-2B VISAS?

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# IRMA

Currently, the H-2B visa program is the only existing program allowing U.S. companies to petition for lower-level skilled or unskilled labor.

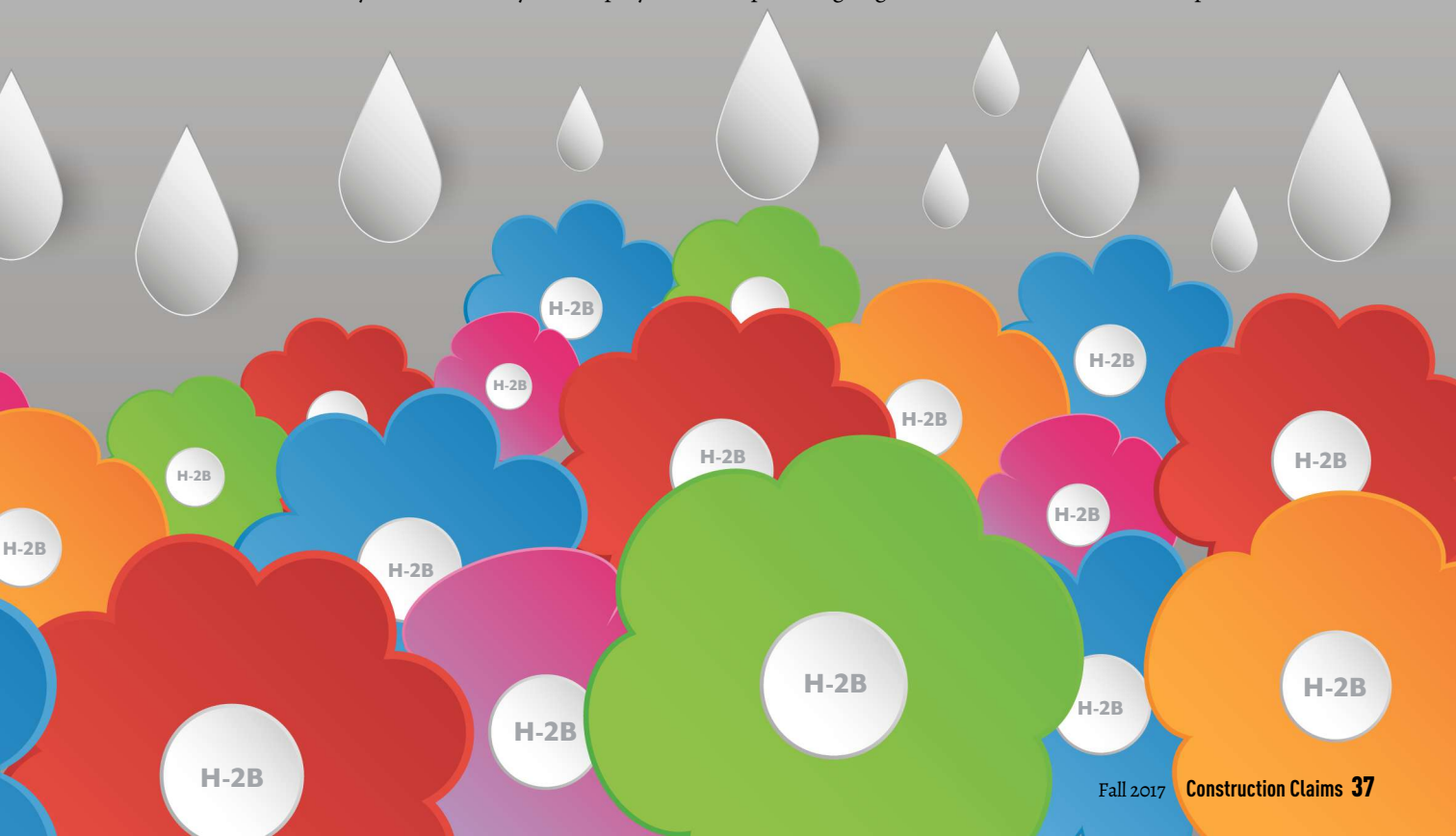
Most other visa classifications are for foreigners who wish to enter the country to work in a professional capacity, such as in a “specialty occupation,” which normally requires that the foreign worker possess at least the equivalent of a four-year U.S. bachelor’s degree.

H-2B visas are available to both skilled and unskilled non-agricultural workers who wish to work in the United States temporarily. Beneficiaries of this program can bring their spouse and unmarried children (under the age of 21) with them to the United States for the duration of their stay. Additionally, the spouses and children of these workers may attend school, but they are not permitted to work.

Typically, the H-2B visa is valid for a one-year period, but in some cases, visas may be extended by the employer if

necessary. Extensions may be granted up to a period of one year, but the limit for the H-2B is a three-year maximum. The U.S. company or petitioning employer is responsible for all of the fees and expenses associated with this process, including legal fees, advertising costs, government filing fees and the transportation costs of the employee to and from the United States. An H-2B beneficiary must have received an employment offer from a U.S. entity to perform temporary or seasonal work. But the experience and background check requirements imposed upon a foreign worker must be the same as those imposed upon American workers.

The employer must demonstrate that the open position will fill a temporary need by showing that the potential employee will be employed for work that is: (1) a one-time occurrence; (2) seasonal, (3) during peak load or (4) for intermittent needs. As part of the H-2B visa process, employers are also required to request a prevailing wage determination from the U.S. Department of Labor



and must certify they will pay the potential employees the wages stated by the DOL. Finally, the employer must prove it is not able to find workers in the United States who are qualified and available—in other words, that no American worker is “able and willing” to perform the work it needs. U.S. employers and companies can show this only after a cumbersome advertising process that includes job site postings, state workforce agency notices and newspaper ads. The employer is required to advertise and recruit for the position in an attempt to locate U.S. workers. If unsuccessful, the employer may apply to the state workforce agency for a temporary labor certification, which will then trigger the transfer of the request to the DOL for a decision on the request for Labor certification. Once approved, the employer must file a visa petition with the U.S. Citizenship and Immigration Services (USCIS). If the worker is already present in the U.S., in lawful status, a change of status to H-2B

## **If the worker is already present in the U.S., in lawful status, a change of status to H-2B worker may be filed.**

worker may be filed. If the worker is outside of the country, a visa through the U.S. consulate abroad is required. Canadian citizens may bypass this requirement and apply directly at the U.S. border.

Historically, Congress has set numerical limitations, or “caps,” each fiscal year for H-2B visas at 66,000, the total number of foreign nationals who can be issued an H-2B visa. They are split into biannual tranches: 33,000 are available

## **A 2006 study conducted by Tulane University and the University of California, Berkeley, found that, of the construction workers rebuilding New Orleans following Hurricane Katrina, some 25% were undocumented.**

for workers who begin employment in the first half of the fiscal year (Oct. 1-March 31), and 33,000 for workers who begin employment in the second half of the fiscal year (April 1-Sept. 30). Unused numbers from the first half of the fiscal year are available for employers seeking to hire H-2B workers during the second half of the fiscal year, but any unused numbers from one fiscal year do not carry over from one year into the next.

### **Construction Demand Swells**

The H-2B visa program is used to fill temporary or seasonal positions in many different industries, including the construction industry. However, only a small fraction of the H-2B visas issued are for businesses in the construction industry. Currently, the H-2B visa program is the only viable immigration avenue to bring in skilled or unskilled labor on a temporary basis to the United States. However, the construction industry is different from other industries, such as the hospitality industry, in that it cannot always predict the number of employees it will need from season to season. For example, it is easier for a large resort than it is for a construction company to know how many employees it will need every summer. As discussed, the H-2B process is cumbersome and expensive and is usually not worth the time and expense unless a U.S. company plans to petition for a large number of workers at

a time. While some construction companies will be able to meet the expensive and rigorous requirements imposed by both the USCIS and the DOL under the H-2B program, others might not find it wise to pursue. In the end, it depends on the specific needs of the construction company exploring this route and whether their short-term need for skilled or unskilled labor can benefit from the program.

The H-2B program, and moreover the limited number of visas available within that program, may soon be under further scrutiny in the wake of Hurricanes Harvey and Irma. Prior to these storms, both Texas and Florida were already experiencing a lack of construction workers and laborers. This shortage of workers spans the entirety of the United States, as the construction industry workforce never recovered following the Great Recession; as of July 2017, there were still two million fewer workers in the industry than before the economic downturn. This worker deficit will prolong what is already expected to be a lengthy post-hurricane rebuilding process, allowing damaged structures to remain in place longer and delaying repairs and rebuilding. Delays in repairs are likely to increase the number of insurance claims and the amount of damages paid out by carriers. This scarcity of U.S. workers may push more construction firms to pursue workers via the H-2B program, regardless of its



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burdensome process and expense. While the program is far from an ideal solution, construction companies desperate for workers may have no better option.

Further potentially complicating the recoveries in Florida and Texas is the fact that, in the past, undocumented immigrants made up a sizeable portion of the disaster cleanup workforce. A 2006 study conducted by Tulane University and the University of California, Berkeley, found that, of the construction workers rebuilding New Orleans following Hurricane Katrina, some 25% were undocumented. In 2017, both Florida and Texas have moved to punish “sanctuary cities” within their borders. This legislative posturing combined with both a perceived rise in anti-immigrant sentiment and natural-disaster construction demands in Mexico will likely contribute to a reduction in undocumented labor willing to assist with U.S. rebuilding efforts. Given the congressionally limited number of visas available under the H-2B program, a reduction in available and willing undocumented laborers, and an already diminished population of such workers in the United States, the construction industry is projected to face increasing employment-related strain.

The H-2B program has long been controversial for allegedly taking away jobs from U.S. citizens for the benefit of foreign workers. Recently, in announcing the end of the Deferred Action for Childhood Arrivals (DACA) program, Attorney General Jeff Sessions leaned on this same allegation as a purported reason for terminating the program. However, even with an increase in H-2B visas and the implementation of DACA, the construction industry was still experiencing a massive shortage of available and willing workers. The reality is that very few H-2B visas are issued for the construction industry. In 2014, less than 5% of the H-2B visas granted were construction related. It is estimated that—resulting from the termination of DACA combined with a failure by Congress to protect those who benefited from the law—some 700,000 workers in the Unit-



## This scarcity of U.S. workers may push more construction firms to pursue workers via the H-2B program, regardless of its burdensome process and expense.

ed States could be lost, as 1,400 people per day would lose their authorization to work, further straining employers that are hurting to find qualified workers.

Whether or not DACA or H-2B visas have actually cost Americans jobs remains a debatable topic, but what appears more certain is that the construction industry is in desperate need of workers. While the ideal solution would be to generate more of these workers from the U.S. workforce, training takes time that the construction industry and those trying to recover from Harvey and Irma do not have. The H-2B visa is a cumbersome, short-term but somewhat workable solution that may allow the construction industry to patch its needs. How and if the H-2B visa program can be made to conform to more difficult times and circumstances remains to be determined, but we may

soon have an answer.

Knowing the wage and visa laws and following them are key to avoiding serious employment practices violations and penalties from the government for wrongful wage, hour, tax and hiring actions. The investment in qualified legal counsel specializing in immigrant employment can keep contractors out of hot water. The legal process may be complicated, but the effort is worth it when you consider the alternatives—including regulatory or criminal action, uninsured worker injury, and labor practices lawsuits. ■

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