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(Original Signature of Member)

111TH CONGRESS
1ST SESSION

H. R. _____

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

IN THE HOUSE OF REPRESENTATIVES

Ms. ZOE LOFGREN of California introduced the following bill; which was
referred to the Committee on _____

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 Reform
5 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.