

Texas Building and Construction Trades Council, AFL-CIO

1106 LAVACA STREET, SUITE 201 - AUSTIN, TEXAS 78701-2171

PHONE: (512) 472-4111 FAX: (512) 469-9993

www.texasbuildingtrades.org

MICHAEL W. CUNNINGHAM
EXECUTIVE DIRECTOR &
SECRETARY-TREASURER

JAMES C. BERENDZEN
PRESIDENT

MICHAEL E. SHELTON
THE SHELTON LAW FIRM
GENERAL COUNSEL

Statement for the Record

June 8, 2016

United States Senate

Judiciary Subcommittee on Immigration and the National Interest

"The H-2B Temporary Foreign Worker Program: Examining the Effects on Americans'
Job Opportunities and Wages"

Submitted by:

Executive Director Michael Cunningham
Texas State Building and Construction Trades Council

The following comments are submitted on behalf of Texas State Building and Construction Trades Council and our affiliates, which is composed 9 local building and construction trades councils, and 67 other affiliated trade unions in Texas.

My comments will cover only the issues and concerns that we have uncovered on the misuse of H-2B Visa process in the construction industry mostly in Texas and the Gulf Coast since 2007.

I really got involved in tracking the H-2B Visa guest worker program in early 2007 when I found about the employers sending the required union notification letters to the State AFL-CIO in Texas. Since then, I have been actively involved to prevent the Companies and their Registered Agents that game the system from obtaining H-2B visa workers.

After learning just how the process works from beginning to end in the H-2B application process, I knew that this was turning into a much bigger issue that couldn't be handled by my office. I was spending so much time researching companies and filing complaints on technicalities related to the applications and recruiting time lines. So many companies and their agents were making mistakes that it was easy to get their applications denied by the SWA until 2009. I needed to find another way to bring more attention to these H-2B related job postings that many times were large numbers ranging from 100 to 300 workers being advertised, especially for welders.

I have managed to get more unions involved to challenge these companies seeking H-2B visa workers. I put together presentations to our union affiliates and international union representatives on how to detect and react to these H-2B job postings. We had our union members from all over the country start applying for these jobs and we continue this process today. We concentrate on employers that we have identified over the years as abusers of the system. One of our main focuses is related to companies advertising for production welders and production steel metal fabricators and fitters being used in the construction industry.

There have been many H-2B Job Postings over the years that haven't completed the application process after our union members applied. I can only assume these companies found enough American Workers and didn't need the H-2B workers after all. Our members have never been interviewed or offered any employment in these instances.

After having our union members apply for thousands of these jobs since late 2007, we have proven these companies, especially the Job Shops, don't want to hire American Workers and have been getting away with it for many years now. The Employers seeking the use of H-2B visa workers must interview all American Workers applicants to determine if the workers meet the qualifications as advertised. Each applicant that isn't accepted for employment must be given a lawful reason for rejecting them.

On January 19, 2009, new H-2B rules were implemented and the union notification letters were no longer required. There were many big change that happened in the 2009 rules. The DOL did receive the authority to audit, investigate and debar employers and registered agents for committing fraud. This was a great improvement. One of the most transparent things the DOL OFLC did was to create public disclosure of the H-2B data on H-2B applications all the way back to the year 2000. They now publish this data quarterly now for the H-2B Form 9141 Prevailing Wage Determinations and the H-2B Form 9142B results. We review this data regularly to compare with the publications on the Labor Certification Registry established under the Interim Final Rules published in 2015. There is also a Public Certification Registry we also look at once a Notice of Acceptance(NOA) is sent to the SWA's for the official online posting for a minimum of 14 days until 21 days before the job starts.

The NOA is our guide to review the H-2B job posting. We then make a determination if we need our union members need to apply. This is how we find the redacted Form 9142b's to review

Every union member that applies for a job related to the H-2B process and have been denied or never interviewed were filing individual complaints directly to the Administrator of the Office of Foreign Labor certification until this year. Anyone that wanted to find out what companies that have complaints filed against them to the DOL OFLC Administrator by our unions and union members should be able to obtain that information through a FOIA request to the DOL or to the SWA's for complaints they handled. They may be shocked on just how many companies there are on the list.

Starting this year, that office has asked us now to file all our complaints to the State Workforce Agency in each state. We don't know how effective that will be in the future as related to timing delays during the recruiting process. In Texas, the SWA forwards all complaints to the Regional Wage and Hour office in Dallas for review and copies the National Processing Center in Chicago. I know the complaints in Texas are only sent to the Regional Wage and Hour office after a company would be certified to bring in H-2B workers. This means we most likely will not be able to get the H-2B applications denied like we did before. We can only hope for debarment and criminal prosecution for filing false statements to the government under the penalty of perjury and making any affected workers whole in any back wages.

When our union members do get interviewed, we have found they have more requirements that was including in the job descriptions. We find this true when advertising for production welders with very minimal experience required in the job description and then tells our applicants you must pass a welding test.

Companies in the construction industry are circumventing the hiring of qualified U.S. Workers by abusing the H-2B Visa application process. There are a large number of employers that apply and are certified for these visas and they supply the H-2B foreign guest workers to numerous contactors in the construction industry, even outside of the area approved in the certification process. We have found many companies representing themselves as construction contractors that are actually staff leasing agencies or job shops. These type of labor brokers have named their companies to make the government agencies not question their actual business model, which is supplying

manpower to legitimate construction contractors and direct billing them for the hours worked by the H-2B guest workers.

Under the Interim Final Rules published on April 29, 2015 by the U.S. Department of Labor (DOL) Office of Foreign Labor Certification (OFLC) and the U.S. Citizenship and Immigration Services (USCIS), staffing agencies or job shops would have a hard time now getting past the “Statement of Temporary Need” explanation on the Form 9142B because they always have a need to supply manpower. They have to check a box as either an “Individual Employer” or “H2A Labor Contractor or Job Contractor”, which should not meet that test of Temporary Need. We see many of these Jobs Shops not checking the Individual Employer box on the H-2B 9142B applications.

We have also recently discovered that H-2B 9142B applications that are being certified are not complete in some areas, especially in the H-Recruiting Section.

The biggest concern that we have been addressing to the DOL OFLC and the SWA’s is the misuse of the wrong occupational codes that negatively affect the wages for construction jobs being advertised. This is true for welding and structural steel erection. We have had several meetings with SWA officials and DOL OFLC officials in Washington, DC and in Chicago at the NPC trying to get the misuse of a O*Net-SOC Production occupation code “51-4121-00 Welder, Cutters, Solderers & Braziers” and “51-2041 Structural Metal Fabricators and Fitters” not be used for construction work since both are in the O*Net Job Family of Production Occupations. and is being used for jobs that actually involve construction trades that do welding, such as Pipefitters, Iron Workers and Boilermakers. If you look up the O*Net SOC JOB Family occupations for the Construction and Extraction Industry the occupational codes are assigned a “47-????00 number.

There are many trades that weld in the Construction Industry and many of these construction trades that do welding are trained to weld in registered apprentice programs. Companies that get certified to bring in H-2B Visa guest workers using the Production Welders allows them to do all types of welding under one Job Posting. The U.S.DOL Office of Apprenticeship recognizes the training of welders in registered construction apprenticeship training programs. It is hard to understand why 2 different departments in the DOL are completely contrary in the application of Production Occupations that circumvent the use of Construction Occupations. Even the annual reports that the

DOL OFLC publishes is misleading because these Production Occupations are not counted in the Construction Occupational data.

This is also true for the Structural Metal Fabricator and Fitter (SOC 51-2041) production occupation being used instead of the Structural Iron and Steel Workers (SOC 47-2221) for construction work.

What defines a Production job versus a Construction job? It is very simple. If a company is building a facility that produces a product, then this would be a construction project and construction trades workers should be used. If a company is producing a product, then it should be a production facility and production occupations would be proper.

There is a misconception that building ships or drilling platforms is also production facility. I beg to differ. There are many trades used in doing this type of work. Some people think a building a refinery or chemical plant is production facility. These types of facilities are production facilities once they go into operation. Workers that are employed by the owner to operate the facility are considered to be a production occupation. Workers that are employed by contractors to maintain or replace or build new equipment or units are considered to be construction workers.

I have included several cases that we worked on that showed us just how bad the H-2B process was and the negative impact on construction worker job wages in the different areas of the state and other area of the country involving Texas companies.

Baystone Contractors

This was my first big H-2B case that I got involved with in the 2007.

There was a H-2B related SWA posting for 6,000 welders to build ships in Jefferson County, Texas by a Louisiana company named Baystone Contractors. As it turns out after further research, these jobs were listed on the Form 750a for the "Production Welder/Fitter". This advertisement got a lot of attention since there was no large shipbuilding facility in the area. There was over 9 billion dollars in expansion work in several refineries. A state legislator initiated a request and found that the need was actually for 3,000 in the Motiva Refinery, 1,500 in the Valero Refinery, 1,000 in the Total Petrochemicals Refinery and 500 for the ExxonMobil Refinery and the company wasn't going to build and repair ships.

I sent a letter to the Executive Director of the Texas Workforce Commission in August 2007 with our concerns of the use of the foreign welders in the plants and the misuse of the wrong occupational codes for traditional construction work. There was also a concern of public safety of using untrained workers that would be doing welding and fitting in dangerous facilities. The jobs descriptions didn't require any training, experience or education. I made sure to copy every local elected official where each of the plants were located, including our U.S. Texas Senators, the U.S. Texas House Representative, and the Texas Senate & House Representative.

As it turns out, the Form 750a application was cancelled by the SWA and not sent to the NPC. There were 2 news stories in the Beaumont Examiner & the Houston Chronicle related to this application.

International Plant Services

This was another case that I found about in 2008 related to some Texas companies that had secured and used H-2B Visa workers for projects outside the original attended area of employment.

A story was published in an Omaha World-Herald newspaper on March 5, 2008 and the Engineering News Record that revealed 61 Filipino Foreign Welders were removed from a new power plant being built in Nebraska by H.B. Zachary, a Texas General Contractor. It was reported that these foreign welders were moved to another project that fit with their Visa type. These workers were reported to be employed by Integrated Services (InServ) out of Houston. We also found out that these production welders were actually employed by and being furnished by 2 Texas companies that were actually Job Shops providing these H-2B workers to InServ. These companies were International Plant Services (IPS) located in Deer Park, TX and Global Processing Services (GPS) in Corpus Christi, TX

In another news story published in an Emporia, Kansas news article on April 9, 2008 revealed that 100 Filipino Foreign Welders & Pipefitters were removed from a new power plant by the InServ company. This power plant was being built for Westar Energy in Kansas by Black & Veatch. InServ was the subcontractor for Overland Construction Co., which was an owned company of Black & Veatch. It was reported that these foreign welders were also moved to another project that fit with their Visa type. These workers were reported to be employed by InServ out Houston. We also found out that these welders were actually employed by several Texas subcontractors (Staff

Leasing Agencies) to InServ. These companies are International Plant Services (IPS) located in Deer Park, TX, Global Processing Services, V People Energy Services, GAS Unlimited, Inc. and GTS, Inc. These companies were furnishing the H-2B Visa Workers to InServ.

Since none of any of the companies filed the H-2B Form 750a in Nebraska or Kansas, I researched to find out if InServ or IPS filed a Form 750a in Texas. Neither company filed the H-2B Form 750a in Texas and even if it was filed in Texas the H-2Bs are confined to a specific work location in that state. Our research shows that Integrated Services, Inc.(InServ) removed the H-2B workers off of the Kansas and Nebraska Projects but they continued using a combination of E-2 Treaty Trader Visas for “Key Essential Specialized Welder Employees” supplied to InServ by International Plant Services & V People Energy Services and H-2B production welders were also supplied to InServ. I discovered that GPS filed the Form 750a in Oklahoma for 90 production welders in June 2007 for work to be done from October 1, 2007 to June 30, 2008 at InServ’s main office and fabrication shop is in Tulsa, OK.

In December 2005, International Plant Services, Inc.(IPS), supposedly an engineering services company applied for and received 50 Engineering E-2 Treaty Trader Visas that were provided to Turner Industries in Louisiana for 25 Engineers and the other 25 Engineers to Repcon on projects in Illinois and Tennessee. In June 2005, IPS also filed for 300 H-2B production welders and pipefitters for TIMEC Company, Inc. that were to be used during the 10-month period of October 1, 2005 to June 30, 2006. The H-2 application was approved for the 300, but TIMEC only took 50 of these H-2B’s at first. The other 250 were brought in and sent to numerous other companies throughout the country. TIMEC eventually utilized up to 90 of the H-2B’s supplied by IPS.

IPS didn’t file an H-2B application in 2006. Instead, they applied for 1,200 E-2 Treaty Trade Visas that included 300 Engineers and 900 Specialized Welders. They received all of these Visas and provided many of these E-2 Visas workers directly to their clients. The majority of their welders working on the 2005 H-2B’s were brought back as E-2’s. IPS is a job shop and doesn’t really do engineering contracting or construction services.

On June 1, 2007, IPS sister company GTS filed for 400 H-2B production welders in Oklahoma and that application was approved.



We had a meeting with officials from the U.S. State Department to address the blatant use of the E-2 Treaty Trader Visas being used for construction jobs instead of going through the H-2B Visa process. The E-2's did not have a labor market test and were issued for up to 3 years and many were approved for 2 one year extensions. One more important thing we discovered is that the E-2 Visa Worker were able to get Transportation Workers Identification Credentials (TWIC's) issued by the TSA. The H-2B foreign guest workers are not eligible for TWIC's. The E-2's weren't restricted on working multiple work sites for the company listed on their visa in many states like the H-2B's are limited. We believe the U.S. State Department and ICE have addressed the E-2 Visa misuse. Job Shops aren't eligible for the E-2's, but they sure fooled our government agencies. I have included a publication addressing these E-2's and H-2B abuse.

IPS recently was partially certified on 2 separate H-2B applications to bring in construction pipefitters and production welders to be provided to Bechtel beginning 06/01/16 at the Exxon Refinery in Baytown Texas. They applied for 400 hundred construction pipe fitters and 200 production welders for the same construction project. We haven't determined just how many they were allowed. I have filed a complaint with SWA. The SWA forwarded my complaint all the union member complaints to the DOL Wage & Hour office in Dallas. The pipe fitter prevailing wage is over \$23 an hour while the welders are around \$21 an hour. Most of the welders working on construction projects around the Houston area are making \$30 to \$40 an hour with per-diem. We had many union workers that applied for these jobs and none were never interviewed. A FOIA request is in the process to obtain all the related documents to these to partial certifications. Part of my complaint is related to IPS still being a Job Shop that will provide just the labor to Bechtel. I have provided 2 redacted Form 9142B partial certifications that were just put on the Labor Certification Registry last week for IPS.

South Texas Erectors

This is a San Antonio Steel Erection Contractor and for several years they were certified to bring in H-2B visa workers under the Laborer classification, In 2010 and in 2012 they were partially certified to bring 62 production welders to do fabrication welding in their fabrication shop using Welder-Fitter (SOC 51-4121) production occupation being used instead of the Structural Iron and Steel Workers (SOC 47-2221) for construction work. This company is a construction company that competes against other companies and didn't have a fabrication shop. I filed a complaint



against this company to the DOL OFLC Administrator on December 4, 2011. There was also a wage disparity between the 2 occupations in both 2010 and 2012. I never heard back on my complaint.

The Texas Iron Workers District Council President also filed a complaint to the DOL OFLC Administrator on November 1, 2012 relating to my 2011 complaint and the 2012 H-2B partial certifications. We reviewed over 1,800 pages of FOIA documents related to this company history securing visas. He never heard response to his complaint. He sent another letter on February 22, 2013 and never received a response. We discovered some of the H-2 B workers working in the Austin MSA when they were supposed to be in the San Antonio MSA. I know the company and their attorney agent were sent Requests for Information asking them about working workers outside the intended area of employment. The response I was told by the NPC Supervisor that they only sent their permanent employees into other MSA and not the Visa Workers. We had proof that wasn't true. South Texas Erectors hasn't filed any more H-2 applications since 2012. I have included the complaints that were sent to the DOL OFLC.

Margaret Hunt Hill Bridge in Dallas

This project got a lot of press because the company installing the bridge components were using 16 B-1 Business Visa Workers to do welding instead of workers that should have clearly been covered under the H-2B process, which includes the labor market test. The Italian company Cimolai had a supervisor utilizing the L-1B Intra-company Transfer Visa. The project had federal money in it requiring the payment of the Davis-Bacon prevailing wages. After initiating complaints with the DOL and the Texas Workforce Commission, we were able to get the 16 workers over \$34,000 in back wages and overtime. We even got ICE and the State Department involved. When they went home for a visit, the State Department denied them re-entry into the U.S. on the B-1 Visa. I filed a complaint with Governor Rick Perry on this project and never got a response from him. The attorneys representing Cimolai unsuccessfully tried to get that rescinded. American Workers got to finish the welding the Bridge.

Dean Roofing Company

This company is from around the Austin area. They was certified to bring in 40 Roofer Helpers at \$11.65 an hour this year. After reviewing the H-2B Form 9142B and related documents, I found

several issues that we have suspected companies have been doing for many years. They listed 7 school district projects in their timeline. They plan shows they intended to use 9 permanent employees to 40 helpers on each project. In Texas, we have a state prevailing wage law. Many of our school districts have adopted the Davis-Bacon wage determinations and only allow the use of registered apprentices. We are still researching this one to see if state laws have been violated. This should have been addressed by the DOL before issuing certifications when it comes to publicly funded projects.

There are so many other cases that I just can't cover at this time.

What can we do to resolve these issues I have presented? There needs to be more funding to hire more staff to handle all of these H-2B applications and all the other Visa Programs they administer, especially in the National Prevailing Wage Center (NPWC). The NPWC should be given the authority to challenge the occupations submitted on the Form 9141 prevailing wage applications. We were told they didn't have the authority to do that when we did a presentation to their entire staff in 2011.

We need more investigators assigned to actually go out and check these jobsites to make sure these H-2B workers are where they are supposed to be working. There needs to be stiffer penalties that actually can have companies and attorneys prosecuted that commit fraud and lie to the government.

This would make company owners and their registered think twice about committing fraud.

In jobs related to the construction industry, no production occupations should ever be approved that causes wage disparity. Investigators need to check and make sure that the American Workers and the H-2B Visa workers are treated equally when it comes to pay equity.