

AMENDMENT NO. _____ Calendar No. _____

Purpose: To strengthen the whistleblower protections for H-2B nonimmigrants.

IN THE SENATE OF THE UNITED STATES—113th Cong., 1st Sess.

S. 744

To provide for comprehensive immigration reform and for other purposes.

Referred to the Committee on _____ and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by Mr. BLUMENTHAL

Viz:

1 At the appropriate place, insert the following:

2 **SEC. ____ . WHISTLEBLOWER PROTECTIONS.**

3 (a) IN GENERAL.—Section 214(c) (8 U.S.C. 1184(c))

4 is amended by adding at the end the following:

5 “(15) WHISTLEBLOWER PROTECTIONS.—

6 “(A) PROHIBITIONS.—A person may not

7 intimidate, threaten, restrain, coerce, blacklist,

8 discharge, or in any other manner discriminate

9 against any employee or person associated with

10 the employee regarding pay, terms, or privileges

11 of employment, including housing, because that

12 person is perceived to have assisted or—

1 “(i) such employee—

2 “(I) has filed or is about to file
3 a complaint, instituted or caused to be
4 instituted any proceeding, testified or
5 is about to testify, cooperates, or
6 seeks to cooperate, in an investigation
7 or other proceeding concerning the
8 employers compliance with the re-
9 quirements under this title or any rule
10 or regulation pertaining to this title;

11 “(II) is about to or has disclosed
12 or otherwise communicated in any
13 way information to the employer, or
14 to any other person, that the employee
15 reasonably believes evidences a viola-
16 tion of this title, or any rule or regu-
17 lation pertaining to this title;

18 “(III) has consulted with a work-
19 ers’ center, community organization,
20 labor organization, attorney, or exer-
21 cised or asserted any right or protec-
22 tion; or

23 “(IV) is about to or has assisted
24 or participated or is about to assist or
25 participate in any manner in such

1 proceeding or in any other action to
2 carry out the purposes of this Act;

3 “(ii)(I) such employee, or another per-
4 son at the employee’s request, has filed a
5 complaint or begun a proceeding related to
6 a violation of this Act or any Federal
7 workplace claim or has testified or will tes-
8 tify in such a proceeding; or

9 “(II) the person perceives that the
10 employee has filed or is about to file a
11 complaint or has begun or is about to
12 begin a proceeding related to a violation of
13 this Act or any Federal workplace claim;

14 “(iii) the employee cooperates, or the
15 employer perceives that the employee is
16 about to cooperate, with a health, safety,
17 or security investigation by any Federal
18 agency investigating workplace claims in-
19 cluding the Department of Labor, the De-
20 partment of Homeland Security, or the
21 Department of Justice;

22 “(iv) the employee furnishes, or the
23 employer perceives that the employee is or
24 is about to furnish, information to the De-
25 partment of Labor, the Department of

1 Homeland Security, the Department of
2 Justice, or any Federal, State, or local reg-
3 ulatory or law enforcement agency as to
4 the facts relating to a violation of this Act
5 or any Federal workplace claim;

6 “(v)(I) the employee has consulted
7 with an attorney, labor organization, com-
8 munity organization, or workers’ center or
9 exercised or asserted any right or protec-
10 tion related to a violation of this Act or
11 any Federal workplace claim; or

12 “(II) the person believes that the em-
13 ployee has consulted with an attorney,
14 labor organization, community organiza-
15 tion, or workers’ center or exercise or exer-
16 cised or asserted any right or protection
17 related to a violation of this Act or any
18 Federal workplace claim; or

19 “(vi) the employee objected to, or re-
20 fused to participate in, any activity, policy,
21 practice, or assigned task that the em-
22 ployee (or other such person) reasonably
23 believed to be in violation of any provision
24 of this Act or any other Act, or any order,

1 rule, regulation, standard, or ban under
2 any this Act.

3 “(B) ENFORCEMENT.—(i) The Secretary
4 of Labor is authorized to take such actions, in-
5 cluding issuing subpoenas and seeking appro-
6 priate injunctive relief and specific performance
7 of contractual obligations, as may be necessary
8 to ensure employer compliance with the terms
9 and conditions of employment under this title,
10 including prohibition on termination and evic-
11 tion from employer provided housing.

12 “(ii) The rights and remedies provided to
13 workers under this Act—

14 “(I) are in addition to any other con-
15 tractual or statutory rights and remedies
16 of such workers;

17 “(II) are not intended to alter or af-
18 fect such rights and remedies; and

19 “(III) may not be waived by any
20 agreement, policy, form, or condition of
21 employment.

22 “(C) COMPLAINT PROCEDURES.—(i) An
23 employee alleging discharge, discipline, black-
24 listing or discrimination in violation of subpara-
25 graph (A), or another person at the employee’s

1 request, may file a complaint with the Secretary
2 of Labor not later than 180 days after the al-
3 leged violation occurred. All complaints initiated
4 under this section shall be governed by the legal
5 burdens of proof set forth in section 42121(b)
6 of title 49. Upon receiving the complaint, the
7 Secretary of Labor shall notify, in writing, the
8 employer alleged to have committed the viola-
9 tion of the filing of the complaint.

10 “(ii) Not later than 60 days after receiving
11 a complaint under clause (i), and after pro-
12 viding the complainant and the person named
13 in the complaint an opportunity to submit to
14 the Secretary a written response to the com-
15 plaint, an opportunity to meet with a represent-
16 ative of the Secretary to present statements
17 from witnesses, and an opportunity to rebut all
18 material submissions of each party, the Sec-
19 retary of Labor shall conduct an investigation,
20 determine whether the complaint has merit, and
21 notify, in writing, the complainant and the em-
22 ployer alleged to have committed the violation
23 of such determination. If the Secretary of
24 Labor determines that a violation occurred, the
25 Secretary shall include with the notification

1 findings and a preliminary order for the relief
2 provided under subparagraph (D).

3 “(iii) Not later than 30 days after being
4 notified of the Secretary’s determination under
5 clause (ii), the complainant and the employer
6 alleged to have committed the violation may file
7 objections to the findings or preliminary order,
8 or both, and request a hearing on the record.
9 The filing of objections does not stay a rein-
10 statement ordered in the preliminary order. If
11 a hearing is not requested during this 30-day
12 period, the preliminary order is final and not
13 subject to judicial review.

14 “(iv) A hearing shall be conducted expedi-
15 tiously. Not later than 120 days after the end
16 of the hearing, the Secretary of Labor shall
17 issue a final order. Before the final order is
18 issued, the proceeding may be ended by a settle-
19 ment agreement made by the Secretary of
20 Labor, the complainant, and the employer al-
21 leged to have committed the violation.

22 “(v) If a person fails to comply with an
23 order issued under this subparagraph, the Sec-
24 retary of Labor shall bring a civil action to en-
25 force the order in the district court of the

1 United States for the judicial district in which
2 the violation occurred.

3 “(vi) Absent other immigration relief, the
4 Attorney General and the Secretary of Home-
5 land Security shall grant advance parole, pursu-
6 ant to section 212, to the nonimmigrant to re-
7 main legally in the United States for time suffi-
8 cient to fully and effectively participate in all
9 legal proceedings related to any action taken
10 pursuant to this section.

11 “(D) RELIEF.—(i) If the Secretary of
12 Labor determines, on the basis of a complaint
13 under this paragraph, that an employer violated
14 subparagraph (A), the Secretary shall order the
15 person to—

16 “(I) take affirmative action to abate
17 the violation;

18 “(II) reinstate the complainant to the
19 former position or equivalent position in a
20 subsequent season with the same pay and
21 terms and privileges of employment; and

22 “(III) pay compensatory damages, in-
23 cluding back pay with interest and com-
24 pensation for any special damages sus-
25 tained as a result of the discrimination, in-

1 cluding litigation costs, expert witness fees,
2 and reasonable attorney fees.

3 “(ii) If the Secretary of Labor issues an
4 order under clause (i) and the complainant so
5 requests, the Secretary may assess against the
6 employer against whom the order is issued the
7 costs (including attorney fees) reasonably in-
8 curred by the complainant in bringing the com-
9 plaint. The Secretary shall determine the costs
10 that reasonably were incurred.

11 “(iii) Relief in any action under this para-
12 graph may include punitive damages in an
13 amount not to exceed \$250,000.

14 “(E) JUDICIAL REVIEW.—(i) With respect
15 to a complaint filed under subparagraph (C)(i),
16 if the Secretary of Labor has not issued a final
17 decision within 210 days after the filing of the
18 complaint and if the delay is not due to the bad
19 faith of the employee, the employee may bring
20 an original action at law or equity for de novo
21 review in the appropriate district court of the
22 United States, which shall have jurisdiction
23 over such an action without regard to the
24 amount in controversy, and which action, at the

1 request of either party to such action, shall be
2 tried by the court with a jury.

3 “(ii) A person adversely affected by an
4 order issued after a hearing under subpara-
5 graph (C) may file a petition for review, not
6 later than 60 days after the order is issued, in
7 the court of appeals of the United States for
8 the circuit in which the violation occurred or
9 the person resided on the date of the violation.
10 Review shall conform to chapter 7 of title 5.
11 The review shall be heard and decided expedi-
12 tiously. An order of the Secretary of Labor sub-
13 ject to review under this subsection is not sub-
14 ject to judicial review in a criminal or other civil
15 proceeding.

16 “(F) PRIVATE RIGHT OF ACTION.—A non-
17 immigrant employee described in section
18 101(a)(15)(H)(ii)(b) who is facing threats or
19 retaliation described in subparagraph (A) may
20 commence a civil action to seek injunctive relief
21 in an appropriate district court of the United
22 States, which shall have jurisdiction over such
23 an action without regard to the amount in con-
24 troversy or citizenship of the parties. The action
25 shall be governed by the legal burdens of proof

1 set forth in section 42121(b) of title 49, United
2 States Code. In a civil action under this sub-
3 paragraph, the court may award such non-
4 immigrant reasonable attorney's fees, including
5 litigation expenses, and costs.

6 “(G) PROCESS FOR REPORTING PROBLEMS
7 TO THE DEPARTMENT OF HOMELAND SECUR-
8 RITY.—(i) The Secretary of Homeland Security
9 shall establish, by regulation, a process by
10 which any person may report to the Secretary
11 of Labor regarding violations of this title.

12 “(ii) If a report submitted under clause (i)
13 identifies the person making the report, the
14 Secretary of Homeland Security shall respond
15 promptly to such person and acknowledge re-
16 ceipt of the report.

17 “(iii) The Secretary of Homeland Security
18 shall—

19 “(I) review and consider the informa-
20 tion provided in any report submitted
21 under clause (i); and

22 “(II) take appropriate steps to ad-
23 dress any problems or deficiencies identi-
24 fied.

1 “(H) DISCLOSURE OF IDENTITY.—(i) EX-
2 cept as provided in clause (ii), or with the writ-
3 ten consent of the employee, the Secretary of
4 Labor or the Secretary of Homeland Security
5 may not disclose the name of an employee who
6 has provided information about an alleged viola-
7 tion under this title, or a regulation prescribed
8 or order issued under any this title.

9 “(ii) The Secretary of Labor or the Sec-
10 retary of Homeland Security shall disclose to
11 the Attorney General the name of an employee
12 described in clause (i), after providing reason-
13 able advance notice to the affected employee, if
14 the matter is referred to the Attorney General
15 for enforcement.

16 “(I) EDUCATION.—Each institution cov-
17 ered by this Act shall—

18 “(i) prominently communicate to all
19 sectors and ranks of its labor force the
20 rights and responsibilities under this Act;
21 and

22 “(ii) provide associated education and
23 training to all sectors and ranks of its
24 labor force through training classes, sup-
25 plemented with website materials on the

1 training and developments that would af-
2 fect the implementation of this Act.

3 “(J) SAVINGS PROVISIONS.—Nothing in
4 this paragraph may be construed—

5 “(i) to preempt or diminish any other
6 safeguard against discrimination, demo-
7 tion, discharge, suspension, threats, har-
8 assment, reprimand, retaliation, or any
9 other manner of discrimination provided by
10 Federal or State law; or

11 “(ii) to diminish the rights, privileges,
12 or remedies of any employee under any
13 Federal or State law or under any collec-
14 tive bargaining agreement.

15 “(K) DEFINITIONS.—In this paragraph:

16 “(i) EMPLOYEE.—The term ‘em-
17 ployee’ means a nonimmigrant alien admit-
18 ted pursuant to section
19 101(a)(15)(H)(ii)(B) or persons employed
20 by the same employer and performing sub-
21 stantially the same work as such non-
22 immigrants.

23 “(ii) DISCLOSE.—The term ‘disclose’
24 means to make a formal or informal com-
25 munication or transmission.

1 “(iii) WORKPLACE CLAIM.—The term
2 ‘workplace claim’ means any claim, peti-
3 tion, charge, complaint, or grievance filed
4 with, or submitted to, a Federal, State, or
5 local agency or court, relating to the viola-
6 tion of applicable Federal, State, or local
7 labor or employment laws.”.

8 (b) RULEMAKING.—Not later than 180 days after the
9 date of the enactment of this Act and after an opportunity
10 for notice and comment, the Secretary shall promulgate
11 regulations to carry out the amendment made by sub-
12 section (a).