

# **The Impact of the H-2B Program on the U.S. Labor Market**

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### **Introduction**

Labor economists often disagree about the impact of immigration on the wages and employment opportunities of workers already in the U.S. However, there should be little disagreement about the economic impact of the H-2B visa program. This program allows non-agricultural U.S. employers to alleviate some seasonal labor shortages by hiring foreign-born temporary workers. In my opinion, the H-2B program benefits small businesses, workers, and consumers in the U.S. Scaling back the H-2B program will have a deleterious effect on revenue, employment, and wages in some seasonal industries. In contrast, an increase in the number of H-2B visas that can be issued each year would benefit workers, consumers and small businesses in the U.S. Given the prevailing wage and labor market test provisions of the program, an increase in the number of visas will not depress the wages or employment opportunities of U.S. workers.

In general, immigration tends to reduce the wages of workers directly competing with new foreign-born workers and increase the wages and employment opportunities for workers who are complementary to the new arrivals. Foreign workers entering the U.S. through the H-2B program will not depress the wages of similar domestic workers for two important reasons. First, employers authorized to hire H-2B workers are required to pay a prevailing wage set by the Department of Labor. The 2015 Final Rule for the H-2B program sets the prevailing wage equal to the mean wage in the area of intended employment so that foreign workers receiving the prevailing wage will not adversely affect the wages of domestic workers in the same occupation and area.<sup>1</sup> Whether this required prevailing wage is set so high that it depresses economic activity in some sectors and industries is a question worth further investigation. In addition, before an employer can hire H-2B workers, the employer must demonstrate that he/she was unable to successfully hire domestic workers to fill these positions thus establishing that there are no such directly competing U.S. workers.

### **H-2B Visas Can Help U.S. Workers and Businesses**

H-2B workers help U.S. workers and businesses because visas are issued only if an employer can't find enough domestic workers to fill all of its seasonal job vacancies. This means that each H-2B visa recipient

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<sup>1</sup> The wage rule was also amended in the Consolidated Appropriations Act of 2016 which required that the prevailing wage be the greater of the (1) actual wage level paid by the employer to other employees with similar experience and qualifications for such position in the same location; or (2) the prevailing wage level for the occupational classification of the position in the geographic area in which the H-2B non-immigrant will be employed, based on the best information available at the time of the filing of the petition. In the determination of the prevailing wage for the purposes of the H-2B program, the Secretary shall accept private wage surveys even in instances where Occupational Employment Statistics Survey data are available unless the Secretary determines that the methodology and data in the provided survey are not statistically supported.

does not displace a domestic worker but instead fills a position that otherwise would have remained vacant. When a seasonal job vacancy is filled by a foreign-born worker the business benefits because it is better able to increase output during peak seasons. In addition, permanent U.S. employees who are complementary to seasonal workers benefit from the program because a reliable supply of temporary workers increases their job security and income opportunities. For example, domestic workers in occupations with very few H-2B workers, such as managers, supervisors, mechanics, and bookkeepers will have more job security and higher expected income if the landscaping company is able to hire H-2B landscaping workers to expand operations during months of peak demand.

### **U.S. Employers Must Pay the H-2B Prevailing Wage**

Throughout the U.S. economy the wages paid to workers are generally determined by market forces. In the H-2B program, the U.S. Department of Labor (DOL) determines the lowest possible wage that can be paid to H-2B workers and to U.S. workers recruited for the same positions. This is known as the prevailing wage. The 2015 Final Rule sets the prevailing wage for H-2B labor certification purposes at “the arithmetic mean of the wages of workers similarly employed in the area of intended employment using the wage component of the BLS Occupational Employment Statistics Survey (OES).”<sup>2</sup> The only exceptions to this requirement are if the job opportunity is covered by a collective bargaining agreement or if the employer provides a third-party survey acceptable to the Office of Foreign Labor Certification (OFLC).

The wage distribution in most occupations is skewed; a few highly paid workers disproportionately raise the average while low wages are constrained by state or Federal minimum wages. For example, there are more than 540 areas for which the OES reports a mean and median wage (the wage at the 50<sup>th</sup> percentile of the distribution) for landscaping workers and the mean wage exceeds the median wage in 96% of these areas. Consequently for the vast majority of occupations and labor market areas the mean wage exceeds the median wage. Employers must pay H-2B workers at least a wage that is higher than the wages paid to more than half of employees in the same occupation and labor market area. It is therefore inaccurate to characterize H-2B visa workers as “cheap labor” because these workers and their U.S. counterparts are paid the prevailing wage.

The prevailing wage is set high enough in the Final Rule so that H-2B workers receiving this wage will not depress the wages of U.S. workers in the same occupation and area. Empirical studies of immigration and wages provide no evidence about the impact of the H-2B program on domestic wages because H-2B visas are both temporary and non-immigrant.

### **Labor Market Test**

Another protection for domestic workers in the H-2B Final Rule is the requirement that the Department of Labor (DOL) must certify that a qualified U.S. worker is not available to fill the petitioning H-2B employer’s job opportunity for a temporary nonagricultural worker before issuing a temporary labor certification. The law also requires a showing that unemployed U.S. workers are not available to perform the services described in the petition for temporary foreign workers before an H-2B petition can be approved. The DOL sets standards by which employers must demonstrate that they have tested the labor market and found insufficient numbers of qualified and available U.S. workers. This labor market test includes placing ads for these temporary positions with a rate of pay equal to the prevailing wage.

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<sup>2</sup> “Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program”, April 29, 2015, *Federal Register*, p. 24184.

## **For Most Occupations the H-2B Program is Small Relative to the Size of the U.S. Labor Market**

The following Table lists the number of DOL temporary labor certifications for H-2B visas in fiscal year 2015 as a percentage of employment in each of the top 15 H-2B occupations.<sup>3</sup> It is important to note that there are more temporary labor certifications than H-2B visas issued each year. For example, while there is a statutory annual cap of 66,000 H-2B visas, there were over 82,000 temporary labor certifications for the top 15 occupations in fiscal year 2015. This means that the number of temporary labor certifications overestimates the size of the H-2B visa program.

In 9 of the top 15 occupations, H-2B temporary labor certifications account for less than 1 percent of the workforce in each occupation, and in only 2 occupations do temporary labor certifications account for more than 5 percent of the workforce in that occupation. Because workers willing and able to supply temporary labor to one of these occupations would often be qualified to work in some of the other occupations, it makes sense to also consider the ratio of temporary labor certifications to domestic employment across all 15 occupations. The final row of this table indicates that there is about one temporary labor certification for every 125 domestic workers employed in these occupations.

In his testimony before this committee on March 16<sup>th</sup> of this year, professor George Borjas of Harvard University stated that it is reasonable to expect that “if immigrants increase the supply of workers in a particular skill group by 10 percent, the wage of that group probably goes down by at least 3 percent.” The majority of workers employed in the top H-2B occupations are in the skill groups with a high school degree or less (according to the American Community Survey). According to the latest jobs report there are about 10 million workers in the U.S. labor force with less than a high school diploma and another 35 million with a high school degree. Using Dr. Borjas reasoning the influx of immigrants from the H-2B program increases the supply of relatively less skilled workers by only a fraction of one percent.

This means that the potential adverse impact of the H-2B program on the wages of domestic workers is much smaller than one fraction of one percent. The protections to domestic workers offered by a prevailing wage equal to the mean wage and the labor market test make a strict statutory cap of 66,000 H-2B visas per year redundant.<sup>4</sup>

## **Should We be Concerned that H-2B Prevailing Wages are Often Below the State Mean Wage?**

A recent study by the Economic Policy Institute compares H-2B certified wages to either the statewide average or national average of the OES wage in the same occupation. This exercise has limited value because wages vary across cities and counties within the same state, and across states in the U.S. because of differences in the cost-of-living and labor market conditions. The Federal government pays its employees different wages depending on their location to reflect these differences. For example, Federal

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<sup>3</sup> FY 2015 is the last full-year of data for which H-2B disclosure data are available. It is noteworthy that the number of temporary labor certifications in FY 2015 is higher than in FY 2014 even though the visa cap was 66,000 in both years. This means that a higher fraction of employers who received a temporary certification were denied an H-2B visa because of the cap in FY 2015 compared to FY 2014.

<sup>4</sup> A limited number of H-2B temporary visas each year would offer some protection to domestic workers if H-2B employers were able to pay foreign workers less than most U.S. workers and if employers could hire foreign workers instead of domestic workers who are willing to do temporary work for market wages. Since the Final Rule does not allow either of these possibilities, the only effect of the statutory cap is to deny H-2B visas to unfortunate employers who have demonstrated a need for the visas after the cap has already been met.

employees in Watertown, New York earn less than those in New York City in the same occupation.<sup>5</sup> Finally, the mean wage in most labor market areas in a state is below the state mean wage.

For example, the 2015 OES reports that the average wage for landscaping workers (SOC 37-3011) in the state of New York was \$15.12. The OES also reports average wages for landscaping workers in 16 different local labor markets within New York. In 14 of 16 of these areas the mean landscaping wage in the metro area was *below* the state mean landscaping wage. This is not surprising because higher wages in a small number of wealthier communities can cause the state mean wage to be higher than the mean wage in most communities. This pattern is not unique to New York; across all states I find that the mean wage for landscaping workers is lower than the mean wage at the state level about 65 percent of the time.

The fact that local wages tend to be lower than state wages is also not unique to landscaping workers. The 2015 OES reports that the average wage for Lawyers (SOC 23-1011) in New York state was \$74.55 (\$155,050 per year), and in 15 of the 16 local labor market areas the mean wage for lawyers in the metro area was *below* the state mean wage. Moreover, in all 16 areas, the mean wage exceeds the median so that fewer than half of lawyers in each area earn as much as the mean area wage and even fewer earn as much as the mean state wage.

Consequently reports showing that many H-2B prevailing wages are below the corresponding state mean wage does not mean that employers are saving on their wage bill by hiring H-2B workers instead of U.S. workers. If this argument were true then law firms outside of New York City, could be accused of hiring “cheap labor” even if they paid the mean wage for their area. Lawyers in Watertown earn much less (\$89,960) on average than in New York City (\$162,140) because of differences in the cost of living and in the market for lawyers in these areas. A firm in Watertown that pays lawyers \$89,960 per year is paying more than most lawyers in the area earn even though it is paying a wage below the state mean of \$155,050. Similarly, the fact that many H-2B prevailing wages are below the state mean is not an indication that H-2B employers are saving on wages by hiring foreign workers. H-2B employers are required to pay H-2B workers the average wage in the local area meaning that foreign workers are generally paid more than a majority of similar workers in their area and occupation.

### **Labor Market Shortages**

Some critics of the H-2B program purport to show that wage and employment trends from either the OES or the American Community Survey (ACS) are inconsistent with labor shortages in H-2B occupations, making the program unnecessary. There are several limitations of this type of analysis. First, the small size of the H-2B program means that it would not be large enough to mitigate widespread national shortages of workers. Because of the strict numeric cap on visas, the H-2B program can be helpful in alleviating temporary and seasonal worker shortages in a limited number of labor markets and occupations.

National wage and employment trends from either the OES or ACS have limited value in assessing whether or not there are shortages of seasonal labor in specific occupations and labor market areas. While the OES reports average wages and total employment for over 250,000 combinations of detailed

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<sup>5</sup> I use Watertown, New York as an example because it is one of the smaller metropolitan areas in New York. The OES sample size in Watertown and other smaller cities is much smaller than the sample size in New York. Consequently the margin of error for the estimated mean wage in Watertown is about four to five times higher than it is in New York City (depending on the occupation). As I discuss below this suggests that third-party surveys might be useful for prevailing wage determinations in smaller labor markets where the OES data are potentially less accurate.

occupations and local areas each year, it reports these data for May of each year. Because the OES and ACS data are only reported annually, these data can't accurately capture seasonal variation in either employment or wages. For example, if landscaping firms in Binghamton, New York find it difficult to hire enough employees during the spring and summer, it would be difficult to detect this seasonal shortage from OES data in May of each year, or from annual ACS data. Moreover, if landscaping firms in Binghamton have bid up the wages of seasonal workers in an attempt to offset the seasonal labor shortage, the OES data are unable to show whether landscaping wages are higher in the summer than in the winter.

H-2B visa critics argue that if businesses can't find enough seasonal and temporary domestic workers to meet peak seasonal demand they should pay higher wages. However, such a wage increase can only be justified if customers are willing and able to pay higher prices. Many small businesses that rely on the H-2B program face price competition and can't pass on higher wages to their customers even in the presence of labor shortages. For example, some domestic oyster producers rely on H-2B visas but face stiff competition from foreign producers.<sup>6</sup> If these businesses face a shortage of workers to shuck oysters during the peak season, it is not feasible to raise wages and prices to attract enough seasonal domestic workers. This is because foreign competition limits how much domestic oyster prices can be raised, and therefore limits seasonal wage increases. With limits on seasonal wage increases because of foreign competition, domestic oyster producers may be forced to limit their production and lose customers to foreign oyster producers if they are unable to hire enough seasonal workers at the prevailing wage.

### **Third-Party Wage Surveys**

The 2015 Final Rule describes situations in which employers can provide a third-party wage survey acceptable to the OFLC for the purposes of making a prevailing wage determination.<sup>7</sup> The DOL will consider an alternative survey if either: (i) The survey was independently conducted and issued by a state, including any state agency, state college, or state university; (ii) The survey is submitted for a geographic area where the OES does not collect data, or in a geographic area where the OES provides an arithmetic mean only at a national level for workers employed in the standard occupation classification (SOC); or (iii)(A) The job opportunity is not included within an occupational classification of the SOC system; or (B) The job opportunity is within an occupational classification of the SOC system designated as an "all other" classification.

While the OES survey is the best available national survey for wages in specific occupations in particular areas, each year the OES produces over 250,000 estimates of average wages by detailed occupation and local area, and some of these estimated average wages are more accurate than others. The OES covers over 800 detailed occupations and over 500 local labor market areas. As an example, the survey reports that the average wage for landscaping workers in 2015 was \$12.42 per hour in Decatur, Alabama, with a margin of error of plus or minus 14.5%. This is because while the OES survey is quite large in the aggregate, the sample size for landscaping workers in Decatur, Alabama is likely to be quite small. If employers believe that the OES mean wage is inaccurate for their local labor market, an independently

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<sup>6</sup> There are many possible examples of small businesses in the landscaping, hospitality or other industries that rely on the H-2B visa program and do not have the market power to raise the price of their product to cover increases in labor costs. In each of these examples price competition in the product market prevents these businesses from simply raising wages, attracting U.S. temporary workers, and eliminating seasonal labor shortages.

<sup>7</sup> See Footnote 1 for a further description of the restrictions on the use of third-party surveys as amended in the Consolidated Appropriations Act of 2016.

conducted survey, with a larger sample size and appropriate methodology, can provide more accurate information than the OES.

### **Conclusion**

The H-2B visa program provides several layers of protections for U.S. workers. The prevailing wage and labor market test make the annual cap of 66,000 visas per year redundant. The H-2B program is expected to benefit U.S. workers by helping their employers adjust to seasonal fluctuations by hiring foreign temporary workers to help meet peak seasonal demand. There are many costs to employers of participating in the H-2B program, including transportation costs, the hiring of agents and attorneys, and the uncertainty of whether requested H-2B visas will be granted. These costs, and the fact that the H-2B prevailing wage is generally higher than the wage paid to the majority of similar workers, means that H-2B workers are a labor supply of last resort for businesses facing shortages of temporary workers. In my opinion the H-2B program provides ample protection for U.S. workers through the prevailing wage and labor market test, and will not have an adverse impact on the wages and employment opportunities of U.S. workers, even if the annual cap on visas was doubled or tripled.

<b>In Most Occupations the H-2B Program is Small Relative to the Number of Domestic Workers</b>	
<b>Top H-2B Occupations</b>	<b>Wage Certifications as % of Employment</b>
<b>Landscaping and Groundskeeping Workers</b>	4.85%
<b>Forest and Conservation Workers*</b>	33.82%
<b>Amusement and Recreation Attendants</b>	2.52%
<b>Maids and Housekeeping Cleaners</b>	0.72%
<b>Construction Laborers</b>	0.42%
<b>Meat, Poultry, and Fish Cutters and Trimmers</b>	1.88%
<b>Waiters and Waitresses</b>	0.08%
<b>Packers and Packagers, Hand</b>	0.24%
<b>Cooks, Restaurant</b>	0.14%
<b>Nonfarm Animal Caretakers</b>	0.93%
<b>Coaches and Scouts</b>	0.64%
<b>Cement Masons and Concrete Finishers</b>	0.70%
<b>Laborers and Freight, Stock, and Material Movers</b>	0.04%
<b>Cutters and Trimmers, Hand</b>	6.44%
<b>Fishers and Fishing Related Workers*</b>	1.48%
<b>Top 15 H-2B Occupations, Overall</b>	0.79%

\*Employment totals obtained from the American Community Survey because few establishments in the Occupational Employment Statistics Survey (OES) employ workers in these occupations. For the remaining categories employment totals are obtained from the OES.