Economic Policy Institute

Frequently asked questions about the H-2B temporary foreign worker program

Fact Sheet • By Daniel Costa • June 2, 2016

Through the H-2B visa program, employers can temporarily bring foreign workers to the United States to perform low-wage work such as landscaping, forestry, housekeeping, and construction. Because the visas are sponsored by employers, H-2B guestworkers cannot switch employers if they are abused, meaning these workers often toil for low wages in poor conditions.

In 2015, the H-2B visa program was effectively doubled through a provision (the "returning worker exemption") introduced during the appropriations process. It is important that the recent expansion of this exploitative program not be continued in fiscal year 2017 and beyond—and that Congress allow regulations providing rights and higher wages to both guestworkers and U.S. workers to be fully implemented.

This FAQ answers the following questions about the H-2B visa program:

- What is the H-2B program?
- In which occupations are H-2B workers employed?
- For how long may H-2B workers be employed?
- How many H-2B workers are employed in the United States?
- How does the returning worker exemption affect the number of H-2B workers?
- Are there labor shortages in the top H-2B occupations that should be filled by guestworkers?
- Are H-2B guestworkers paid the same as U.S. workers?
- Does the H-2B program hurt migrant and American workers?
- Who enforces the rules of the H-2B program, and is enforcement adequate?
- How can lawmakers improve wages and working conditions for Americans and for migrant workers in the H-2B program?

What is the H-2B program?

The H-2B program is a temporary foreign worker program—also known as a guestworker program. Guestworker programs authorize the employment of foreign workers by a U.S. employer, for a temporary period, with nonimmigrant visas. Nonimmigrant visas are temporary—i.e., the visa-holder must depart the United States by a date certain—and distinguishable from "green cards," which are immigrant visas that grant permanent residence (and eventually citizenship, at the option of the beneficiary, if certain steps are completed). With the H-2B program (as with most other guestworker programs) the employer owns and controls the visa. In practice that means that if an H-2B worker is fired, he or she becomes instantly deportable.

In which occupations are H-2B workers employed?

Landscapers/groundskeepers account for about 40 percent of all H-2B jobs. The second-largest occupation is forestry workers, at about 8 percent.[1] In fiscal 2014, the top two occupations accounted for nearly half of all H-2B jobs.[2] The other top occupations include amusement and recreation attendants (working at traveling carnivals), maids and housekeepers, meat and fish processors, construction laborers, and restaurant workers such as cooks and waitstaff.

For how long may H-2B workers be employed?

Migrant workers who are issued an H-2B visa can be employed for up to nine months, but their employment period may be extended for up to three years, or their visa may be initially certified for up to three years if it is considered a "one-time occurrence."

How many H-2B workers are employed in the United States?

Congress has set an annual limit of 66,000 H-2B visas per year, but there are a few occupations that are explicitly exempt from this limit. In fiscal 2015, the State Department issued nearly 70,000 H-2B visas.[3] However, the "returning worker exemption," which has been in effect since December 2015, is likely to result in a much higher number of H-2B visas being issued in fiscal 2016 than the annual cap of 66,000 (for more about the returning worker exemption, see the next section).

In terms of how many H-2B workers are in the country at any given time, the Department of Labor (DOL) estimates the number stands at approximately 115,500, because some H-2B workers remain beyond one year.[4]

How does the returning worker exemption affect the number of H-2B workers?

As a result of congressional appropriations riders, what's known as the returning worker exemption was passed into law in late 2015. It increases the number of H-2B visas that may be issued in fiscal 2016. Under the returning worker exemption, any person who was employed as an H-2B worker during the past three fiscal years may return as an H-2B worker in fiscal 2016 without being counted against the annual cap of 66,000.

The exemption could lead to a large increase in the number of H-2B workers in the United States; technically, the size of the H-2B program could as much as quadruple. However, previous years in which the returning worker exemption was in effect suggest a doubling or tripling is more likely. In fiscal 2007 (the last year the returning worker exemption was in place), for example, nearly 130,000 H-2B visas were issued.[5] Lobbying from employer groups to extend the returning worker exemption for fiscal 2017, or to make it permanent, has already begun.[6]

What's the recent history of the returning worker exemption?

Through her leadership position on the Senate Appropriations Committee, Sen. Barbara Mikulski (D-Md.) has led Congress's efforts on behalf of the returning worker exemption, including in 2015 when she succeeded in getting the exemption passed into law. Some prominent Democrats were opposed to this rider,[7] as evidenced by a letter to Senate leaders from Democratic Sens. Sanders, Blumenthal, Merkley, Durbin, Hirono, Warren, and Franken.[8] Sen. Mikulski has also played a leading role in passing other riders that benefit the seafood processing industry (a major beneficiary of the H-2B program) and erode the Department of Labor's authority to enforce H-2B program rules.

In 2005, Sen. Mikulski introduced legislation that became law which included a returning worker exemption for fiscal 2005 and 2006, which was extended for 2007 through an appropriations rider. In late 2015, Sen. Mikulski—along with Sens. Tillis, Warner, and Cassidy—introduced an updated version of the same bill, which would make permanent the returning worker exemption[9] and repeal many important new protections for migrant workers that were promulgated by the Obama administration in April 2015.[10] If the bill became law it would make

foreign workers more vulnerable to exploitation[11] and keep U.S. workers out of jobs in their local communities.

In the House, four Republicans—Reps. Boustany, Goodlatte, Harris, and Chabot—introduced similar legislation to make permanent the returning worker exemption and remove the DOL's oversight of the program.[12] However, Republicans are not all in agreement when it comes to the H-2B program.[13] On the Democratic side, Rep. Lofgren has also been a leading supporter of the returning worker exemption.[14]

Are there labor shortages in the top H-2B occupations that should be filled by guestworkers?

There's little evidence that there are labor shortages in landscaping, forestry, hospitality, meat/fish processing, and construction jobs. Between 2004 and 2014, wages in all of the top 15 H-2B jobs were either flat or declining.[15] Over the same period, unemployment rates in the top 15 H-2B occupations were very high. All 15 occupations had high average unemployment rates in 2013–2014, most being at or around double digits.[16] In the top H-2B occupation by far, landscaping, the unemployment rate averaged 12.7 percent during 2013–2014, more than double the national unemployment rate in 2014. The combination of flat wages in H-2B jobs with such high unemployment rates suggests that labor shortage claims are unsubstantiated. In fact, this is evidence of a very loose labor market in the top 15 H-2B occupations, despite the low U.S. national unemployment rate.

Are H-2B guestworkers paid the same as U.S. workers?

While "prevailing wage" regulations technically require employers to pay H-2B workers the local average wage for the particular occupation (as determined by DOL wage survey data), the vast majority of H-2B jobs are certified by DOL at lower-than-average wages for the particular occupation. One way employers can pay below-average wages is by using biased and unscientific private wage surveys to set wage rates for their H-2B employees. Prior regulations from 2008 allowing private wage surveys were struck down by a federal court,[17] but they are still allowed in a narrower set of circumstances under more recent and current regulations. The fiscal 2016 appropriations bill restricted DOL's power to reject skewed surveys; there's little doubt employer groups will attempt to extend this provision for fiscal 2017. Another method to lower wages is the creation of a sham union that is

controlled by employers and bargains for wages that are lower than the DOL-established prevailing wages.[18]

H-2B labor certification data published by DOL show that in landscaping, the largest H-2B occupation, employers saved an average of $2.59 per hour in 2014 by hiring an H-2B worker rather than a U.S. worker earning the average wage for landscaping.[19] The savings are similar for employers in states with large numbers of H-2B landscapers.[20] In forestry jobs, the second-largest H-2B occupation, employers saved an average of $3.80 per hour in 2014 by hiring an H-2B worker rather than a U.S. worker earning the average wage in forestry.[21]

Incredibly, migrant workers in the H-2B and H-2A (for jobs in agriculture) visa programs on average earn approximately the same wages as undocumented workers.[22] That means H-2B guestworkers earn no wage premium for having a "legal" immigration status. Instead, they earn as little as undocumented workers who have few labor and employment rights.

Does the H-2B program hurt migrant and American workers?

Yes. There are countless examples of H-2B migrant workers being exploited and robbed of their wages, and much worse. That's why civil rights groups have referred to the H-2B program as "close to slavery."[23] A recent journalistic investigation dubbed it "the new American slavery."[24] The problems begin when H-2B workers are first recruited in their home countries.[25] Most pay large sums to labor recruiters who connect them to temporary jobs in the United States.[26] That leaves the workers who come to the United States indebted to their recruiters and employers. H-2B workers also cannot switch employers, which means that if something goes wrong on the job—for instance, if an H-2B worker isn't paid the wage he or she was promised, or is forced to work in an unsafe workplace—the H-2B worker has little incentive to speak up or complain to the authorities. Complaining can result in getting fired, which leads to becoming undocumented and possibly deported. It also means not being able to earn back the money that was invested in order to get the job.

These features of the H-2B program have led to numerous cases of human trafficking and forced labor involving H-2B workers, including the Signal International case, where hundreds of Indian welders and pipefitters paid $11,000 to $25,000 in recruitment fees and were forced to live in camps with armed guards.[27] The *New York Times* editorialized about another case, noting that the actions of a Wal-Mart seafood supplier's treatment of its H-2B employees amounted to "forced labor" when the supplier forced them "to work 16- to 24-hour days, and 80-hour weeks, at illegally low rates, sometimes locked in the plant, peeling crayfish until their hands felt dead," while some of the workers were even "threatened with beatings."[28] Another news report highlighted that DOL "identified violations in 82% of the H-2 visa cases it investigated" in fiscal 2014.[29] Government auditors have taken notice: A 2015 GAO report on the H-2A and H-2B programs is titled *Increased Protections Needed for Foreign Workers*.[30]

American workers are also hurt because when H-2B workers have few rights and employers are allowed to legally underpay them, it puts downward pressure on the wages and working conditions of American workers who are employed or seeking work in the main H-2B occupations. In addition, though the H-2B provisions in the Immigration and Nationality Act state that H-2B workers must be "coming temporarily to the United States to perform other temporary service or labor *if unemployed persons capable of performing such service or labor cannot be found in this country*"[31] (emphasis added), the reality is that for years, program rules have not ensured that unemployed workers already in the United States have a fair and first shot at H-2B jobs. This was recently documented and explained in a December 2015 news report, which found that in the H-2B and H-2A programs:

> [C]ompanies across the country in a variety of industries have made it all but impossible for U.S. workers to learn about job openings that they are supposed to be given first crack at. When workers do find out, they are discouraged from applying. And if, against all odds, Americans actually get hired, they often are treated worse and paid less than foreign workers doing the same job, in order to drive the Americans to quit.[32]

Who enforces the rules of the H-2B program, and is enforcement adequate?

DOL's Wage and Hour Division (WHD) is in charge of enforcing H-2B program rules that relate to the labor market. However, WHD only has about 1,200 agents but is tasked with protecting the labor and employment rights of 150 million workers—which includes all H-2B workers and Americans who work in H-2B occupations. DOL simply does not have adequate staffing or resources to do its job. Nevertheless, every year it carries out a number of enforcement actions in the H-2B program and other guestworker programs.

Despite the fact that DOL finds significant levels of fraud and program violations by employers, an investigative report found that DOL:

> [R]arely kicks employers out of the program, leaving thousands of workers each year exposed to mistreatment, injury, and even death. Scores of employers have stolen guest workers' pay, forced them to live in overcrowded or dangerous housing, held them at gunpoint, or even been sent to prison for immigration fraud, yet have been allowed by the Labor Department to continue receiving hundreds or even thousands of H-2 visas.[33]

The journalists go so far as to call DOL "The Pushovers," and the report makes clear that DOL is not using all of the authority it has to ban abusive employers from hiring new H-2B workers. There is no doubt that this has occurred at least in part because of intense lobbying from business groups that use the H-2B program.

For its part, DOL responded that "it has made a serious and sustained effort to protect both guest workers and U.S. workers" but added that many of those efforts have "been under constant attack from powerful industry groups seeking to undermine these protections." Industry lobbying has in fact watered down H-2B rules, including via the fiscal 2016 appropriations riders, but DOL's reluctance to ban serious violators and even criminals from using the H-2B program is troubling and unacceptable. Congress should give DOL clearer guidelines about how and when to ban abusive employers from the H-2B program.

How can lawmakers improve wages and working conditions for Americans and for migrant workers in the H-2B program?

Lawmakers in Congress should reject legislation that would expand the exploitative H-2B program because it fails to provide U.S. workers with a fair and first shot at jobs in their local communities, does not adequately protect the migrant workers who come to work in the United States, and does not ensure that migrant workers are paid at least the local average wage for the jobs they fill. Those are also the reasons why lawmakers should reject proposals to create similar new low-wage temporary foreign worker programs.

In addition, lawmakers on appropriations committees with jurisdiction over the departments of Labor and Homeland Security should reject H-2B appropriations riders that make immigration policy but bypass the normal legislative process. The H-2B appropriations riders that became law in the fiscal 2016 appropriations legislation (and which employer groups hope to see passed again in 2017 and beyond) were provisions added to a must-pass government funding bill that were never voted on by the full House and Senate, but nevertheless made major changes to the H-2B program. These provisions doubled or tripled the size of the H-2B program, lowered wages for H-2B workers by permitting private wage surveys, and stripped DOL of much of its already-limited authority to protect workers and sanction law-breaking employers.

Instead, lawmakers should seek comprehensive legislative solutions that tie work visa programs to sectors where there is evidence of a severe labor shortage, and that require employers to pay above-average salaries to the migrant workers recruited to fill those shortages in order to protect U.S. wage standards. Since migrant workers coming to fill genuine labor shortages would be filling gaps in the U.S. labor market and adding value to it, future legislation should allow those workers to self-petition for permanent residence after a short provisional period.

Endnotes

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