

H-2B VISAS: PROVIDING A LEGAL REGIME FOR U.S. EMPLOYERS

Is it better for individuals to work in the United States legally or for people to come here illegally and seek employment? The rational answer is that it is better for people to work legally. If that is the case, then the right course for Congress would be to raise the limit on H-2B visas to facilitate the temporary stay of legal workers in resorts, the seafood industry, landscaping, and other businesses. Legal workers earn between 14 and 40 percent higher wages than those here illegally. Since illegal immigrants earn less than H-2B workers, it makes little sense to oppose increased admissions of H-2B workers on the grounds they represent too much competition for natives.

A major complaint in Congress today is that individuals are not waiting in line to enter the United States legally to work. In the case of H-2B workers, these are individuals who are choosing to wait their turn to enter America. Complaints about illegal immigration grow hollow when Congress does not provide an adequate legal framework for workers and U.S. employers.

BACKGROUND

The annual limit of 66,000 placed on the number of H-2B visa holders who may be admitted to America was reached on January 4, 2005, two months earlier than in 2004. That means U.S. employers are prohibited from hiring an individual for seasonal or other (non-agricultural) temporary work on H-2B visas until October 1, 2005. Critics of immigration say this is good, and that it will mean more jobs for Americans. Proponents of increasing the cap argue that failing to raise the H-2B limit will result in needless harm to U.S. employers, threatening their livelihood in some cases, and that the primary result will be the hiring of illegal immigrants rather than legal workers.

H-2B WORKERS VS. UNLAWFUL HIRING

Under the current regulatory interpretation of the law, up to 66,000 individuals a year are allowed to enter the United States on H-2B visas and work in jobs that are temporary and often seasonal in nature. Employers are required to demonstrate they attempted to find U.S. workers and must pay H-2B workers the prevailing wage for that job.

It would seem naive to think that denying U.S. employers access to H-2B visa holders will result in a massive increase in hiring native-born U.S. workers. In fact, it is likely that the absence of legal temporary workers will mean more illegal immigration.

Reliable data show that legal workers command higher salaries than those here illegally. In other words, preventing businesses from hiring H-2B workers will logically mean more

H-2B VISAS: PROVIDING A LEGAL REGIME FOR U.S. EMPLOYERS

competition for natives with illegal immigrants who possess less bargaining power and earn lower wages than H-2B workers. This is borne out by research.

Two studies demonstrate what common sense tells us: employers pay workers with legal status more than those in America illegally. “The key theoretical hypothesis explaining discrimination against undocumented workers is that illegality allows employers to exert monopsonistic power over these workers because of their great fear of being reported to immigration authorities,” writes Columbia University economist Francisco L. Rivera-Batiz.¹ Simply put, illegal status can create situations where workers feel they have no choice but to hold their tongues and stay where they are, making them less likely to explore better employment opportunities.

“The average hourly wage rate of male Mexican legal immigrants in the U.S. was 41.8 percent higher than that of undocumented workers,” concluded Rivera-Batiz in his study that examined the impact of legalization on the earning of previously–undocumented workers.² (Similar wage increases were found for Mexican female legal immigrants.) The study, using data compiled after the 1986 law that legalized many illegal immigrants, found that “An analysis of undocumented immigrants legalized after the 1986 U.S. immigration policy reform shows significant wage growth in the four years following legalization.” Importantly, Rivera-Batiz adds, “These gains are due mostly to the change in legal status itself, not to changes in the characteristics of immigrants over time.”³

Other researchers have produced similar findings on wages. “Upon arrival in the U.S. labor market, unauthorized men’s wages would have been 14 percent higher if they had been legal workers,” concluded University of Michigan economist Sherrie A. Kossoudji and Australian National University economist Deborah A. Cobb-Clark in their analysis of the 1986 legalization.⁴ Kossoudji and Cobb-Clark note that after a number of years the wage “penalty” for being here illegally (rather than legally) increased, on average, to 22 percent. A portion of the later penalty was because individuals here illegally “had little incentive to invest in human capital while unauthorized and then have large incentives to invest once legalized.”⁵

The bottom line? Those concerned about competition caused by new workers coming to the United States should support foreign workers entering and working in legal status rather than as undocumented immigrants. Since an individual here legally will earn more than an illegal immigrant, he or she is less likely to be hired simply to undercut the wages of others.

BEYOND WAGES

This research on wages is relevant both to H-2B visas and the larger debate about comprehensive immigration reform. However, some may argue that H-2B workers are

H-2B VISAS: PROVIDING A LEGAL REGIME FOR U.S. EMPLOYERS

not akin to newly legalized workers because individuals on H-2B visas enter to work for a specific employer and therefore have less labor mobility than other workers. This ignores a number of factors.

First, H-2B visa holders are in a better position than illegal immigrants to demand fair compensation. “When unauthorized workers enter the U.S. labor market, they may be less likely to maximize wages than to minimize the risk of apprehension by the Immigration and Naturalization Service (INS),” note Kossoudji and Cobb-Clark.⁶ Since they possess valid visas, H-2B workers do not exhibit this fear.

Second, to hire an H-2B worker, U.S. employers must surmount several regulatory hurdles that could even be considered excessive (and beyond a plain reading of the law). To show that an H-2B worker will not displace a U.S. worker, employers must obtain a certification from the Department of Labor that they have attempted to recruit for the position in the United States. Employers must also prove their need for the worker is temporary and the job itself is temporary (“a one time occurrence seasonal, peak load, or intermittent”), and also how the H-2B worker qualifies for the job. The process is bureaucratic and can take months to gain approval. While H-2B visa holders can enter for a year and receive up to two one-year extensions, most stay for less than a year.⁷

Third, under the regulations an employer must pay for a worker’s return travel costs if the H-2B visa holder is “dismissed” prior to the conclusion of the approved work period.⁸

Fourth, likely a more important form of labor protection for an H-2B worker is his or her power to choose a different employer to work for next season. From interviews it is clear that many employers use the same H-2B workers more than once, finding it preferable to employ individuals proven trustworthy and who have gained experience with an employer’s operation. The availability of middlemen or labor contractors who help place H-2B visa holders with employers would seem to make it even easier for a worker to choose a different employer the following year.

Finally, as noted, U.S. employers are obligated to pay H-2B workers the prevailing wage paid to similarly employed Americans. No such obligation exists for most other types of hiring.

ADDRESSING ARGUMENTS AGAINST AN H-2B VISA INCREASE

A primary argument made against increasing the annual H-2B visa limit is that U.S. employers should simply raise wages to attract many more native-born Americans to these jobs. However, industries in which many less desirable jobs reside generally do not produce goods or services with high margins. While it is undoubtedly true that a landscape company can attract more workers if it paid \$200 an hour to employees who mow lawns, it is unlikely that a consumer or company possessing many choices

H-2B VISAS: PROVIDING A LEGAL REGIME FOR U.S. EMPLOYERS

would pay \$200 or more for someone to cut their lawn. Even if all resorts or restaurants, for example, charged vastly more for their services as a result of paying much more for workers, it is likely most consumers would choose to stay home rather than pay significantly higher prices for their meals. In short, there is a wage beyond which it is not profitable to employ a worker. Companies that are consistently unprofitable do not employ anyone, American or otherwise.

Some say businesses should use technology rather than adding foreign-born workers, which would seem to contradict the argument more native-born should be hired for certain jobs. While technological improvements are desirable, it should be self-evident that even where a technological advancement may be a suitable substitute for human labor, the capital investment may be beyond what a company can expect to recoup in sales.

One needs to take a broad view of consumer choice in a market economy. If prices are too high for individuals to vacation at U.S. resorts, then American and foreign tourists may decide to travel to non-U.S. locations or to take shorter trips close to home. Similarly, restaurants compete not only with other eating establishments but also with the ability of consumers to choose to stay home and eat their meals. And businesses and consumers can choose the degree to which they will pay for outside landscaping services, escaping higher prices by scaling back their landscape needs or doing more of the work themselves.

In addition to this more general competition for the consumer dollar, many industries also face international competition. The U.S. seafood industry competes with exporters from Asia and elsewhere. Blocking all seafood imports would raise prices for U.S. consumers and eventually lead to retaliation against American exports. Therefore, simply paying much higher wages to attract workers to the seafood industry is not an option. Companies are in business to earn profits while they provide their good or service. Companies, of course, are not in business simply to employ people and cannot do so, in any case, without earning a profit.

The Washington Post recently described a job fair at which few Hispanic workers showed interest in moving to the Chesapeake Bay area for seven months to earn relatively low wages picking crabmeat. In the past, the industry has relied on workers on H-2B visas, which are no longer available because the 66,000 limit has been reached this year.⁹

TYPES OF EMPLOYMENT

Previous research has established that sufficient availability of legal visas can reduce illegal entry to the United States.¹⁰ In 1954, Joseph Swing, commissioner of the Immigration and Naturalization Service, began a controversial crackdown on illegal immigration. However, the INS commissioner preceded the crackdown by working with growers to

H-2B VISAS: PROVIDING A LEGAL REGIME FOR U.S. EMPLOYERS

replace an illegal and therefore unpredictable source of labor with a legal, regulated one through the already existing bracero program. The large increase in the admission of bracero farm workers produced dramatic results.

After the 1954 enforcement actions were combined with an increase in the use of the bracero program, illegal entry, as measured by INS apprehensions at the border, fell an astonishing 95 percent between 1953 and 1959. After the bracero program ended in 1964, primarily due to complaints from labor advocates, INS apprehensions of people entering illegally increased more than 1,000 percent from 1964 to 1976. It was the start of the illegal immigration tide that we see up to the present day.

One test of whether illegal immigrants are likely to be hired if legal workers on H-2B visas are unavailable is to examine the industries that utilize H-2B workers. If the occupations are generally common to illegal immigrants, this would help demonstrate that blocking the entry of additional workers on H-2B visas is more likely to increase the use of unauthorized workers.

Table 1 details the types of jobs filled by H-2B workers. With few exceptions the jobs share the same characteristics, namely relatively low pay, little room for advancement, and able to be performed by individuals with little education who possess a desire to work hard and learn.

As the list shows, the jobs are mostly the same as those commonly known to be filled by illegal immigrants (when employers do not hire U.S. citizens, lawful permanent residents, or workers on legal visas). Landscape laborer is the top position, followed by forest worker, housekeeper, tree planter, stable attendant, construction worker, and others. Crabmeat processors, shellfish shucker, and deckhand are common H-2B positions. Variations on landscape laborer on the list include groundskeepers and horticultural workers. Businesses that experience peak seasons of operations, including restaurants, hotels, resorts, ski lodges, and amusement parks, use H-2B workers for primarily short periods of time.

H-2B VISAS: PROVIDING A LEGAL REGIME FOR U.S. EMPLOYERS**TABLE 1 - TOP 30 OCCUPATIONAL CATEGORIES FOR H-2B WORKERS IN FY2003**

1. Laborer, Landscape	16. Maids and Housekeeping Cleaners
2. Forest Worker	17. Deckhand, Fishing Vessel
3. Cleaner, Housekeeping	18. Landscaping and Groundskeeping Workers
4. Tree Planter	19. Dishwashers
5. Stable Attendant	20. Ski Tow Operator
6. Construction Worker II	21. Packer, Agricultural Produce
7. Crab Meat Processor	22. Horticultural Worker II
8. Instructor, Sports	23. Material Handler
9. Kitchen Helper	24. Line Erector
10. Nonfarm Animal Caretakers	25. Cook
11. Dining Room Attendant	26. Cannery Worker
12. Circus Laborer	27. Cook Helper
13. Housecleaner	28. Quarry Worker
14. Groundskeeper, Industrial Commercial	29. Amusement Park Worker
15. Shellfish Shucker	30. Waiter/Waitress, Formal

Source: U.S. Department of Labor; National Foundation for American Policy

H-2B VISAS: PROVIDING A LEGAL REGIME FOR U.S. EMPLOYERS**CONCLUSION**

Denying U.S. employers the ability to hire individuals on H-2B visas will not help American workers. The evidence shows that since individuals in legal status earn higher wages than illegal immigrants it makes little sense to oppose the admission of legal H-2B workers under the theory that their entry will increase competition for native workers.

The vast majority of jobs held by H-2B workers are short-term, with low pay by American standards and little room for major advancement. Some mistakenly argue that it is a gift or a business subsidy to provide a reasonable legal regime for U.S. employers to hire foreign workers for these types of positions. Far from a gift, it is a recognition of the reality of the global labor market. Anyone who believes the market for goods and services is purely domestic displays a poor understanding of the 21st century global economy.

As noted, consumers and businesses possess many choices of how to spend their money, so the option of simply increasing wages to attract more workers is not available when this will price a good or service out of the market. By prohibiting U.S. employers from hiring individuals who freely wish to be employed and can do the work, lawmakers would seem to be encouraging consumers and tourists to purchase goods and services not produced by American businesses.

In addition, employers unable to use legal H-2B visas are more likely to end up hiring illegal immigrants, particularly since these jobs generally do not require significant experience, skill level, or training. Employers do not possess an unlimited capacity to raise wages higher and higher until reliable native-born Americans decide to fill certain positions. At a certain point, known by the employers, it is unprofitable to hire workers beyond a particular wage level.

The current annual limit of 66,000 H-2B visas represent less than 0.05 percent of the U.S. labor force. Even doubling the limit, while important to the businesses affected, would still represent less than 0.1 percent of the labor force. Currently, Congress is considering increased annual admissions of H-2B workers.¹¹ Some will argue that preventing increased admission of individuals on H-2B visas will serve the national interest. However, America did not become a wealthy nation by denying opportunity to those who want to work.

A major complaint in Congress today is that individuals are not waiting in line to enter the United States legally to work. In the case of H-2B workers, these are individuals who are choosing to wait their turn to enter America. Complaints about illegal immigration grow hollow when Congress does not provide an adequate legal framework for workers and U.S. employers.

H-2B VISAS: PROVIDING A LEGAL REGIME FOR U.S. EMPLOYERS**END NOTES**

- ¹ Francisco L. Rivera-Batiz, “Undocumented workers in The Labor Market: An Analysis of the Earnings of Legal and Illegal Immigrants in the U.S.,” *Journal of Population Economics*, 1998.
- ² Ibid.
- ³ Ibid.
- ⁴ See Sherrie A. Kossoudji and Deborah Cobb-Clark, “Coming out of the Shadows: Learning About Legal Status and Wages From the Legalized Population,” October 1, 1998.
- ⁵ Ibid.
- ⁶ Ibid.
- ⁷ Jonathan S. Greene, “H Nonimmigrants,” 2003-04 Immigration & Nationality Law Handbook, Volume 2, American Immigration Lawyers Association, pp. 17-19.
- ⁸ Under 8 CFR Section 214.2(h)(6)(vi)(E) it states: “The employer will be liable for the reasonable costs of return transportation of the alien abroad, if the alien is dismissed from employment for any reason by the employer before the end of the period of authorized admission...”
- ⁹ “Md. Crab Industry Angles for Help,” *Washington Post*, February 28, 2005.
- ¹⁰ Stuart Anderson, “The Impact of Agricultural Guest Worker Programs on Illegal Immigration,” National Foundation for American Policy, November 2003.
- ¹¹ S. 352 and H.R. 793.

ABOUT THE NATIONAL FOUNDATION FOR AMERICAN POLICY

Started in 2003, the National Foundation for American Policy (NFAP) is a 501(c)(3) non-profit, non-partisan public policy research organization based in Arlington, Va. The focus of the research is on trade, immigration, and other issues of national importance. NFAP Executive Director Stuart Anderson served as Staff Director of the Senate Immigration Subcommittee, working for Senators Spencer Abraham and Sam Brownback, and as head of policy and counselor to the Commissioner of the Immigration and Naturalization Service. The Advisory Board members include Columbia University economist Jagdish Bhagwati, Ohio University economist Richard Vedder, Rep. Guy Vander Jagt (ret.) and other prominent individuals.