

**Congress of the United States**  
**U.S. House of Representatives**  
**Committee on Small Business**  
2361 Rayburn House Office Building  
Washington, DC 20515-6515

To: Members, Subcommittee on Economic Growth, Tax and Capital Access  
From: Committee Staff  
Date: June 10, 2013  
Re: Hearing: "The Seasonal Employment Needs of Small Tourism Businesses  
and H-2B Visa Policy"

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On Wednesday, June 12, 2013 at 1:00 pm in Room 2360 of the Rayburn House Office Building, the Subcommittee on Economic Growth, Tax and Capital Access will meet for the purpose of examining small tourism business utilization of the H-2B visa program. The H-2B visa program allows employers who cannot find temporary or seasonal United States workers to bring in foreign workers to fill low-skilled, non-agricultural jobs during their peak seasons. Of particular importance to the Subcommittee is a recent regulatory change that may adversely affect the costs faced by small tourism businesses that hire workers with H-2B visas.

### **I. The H-2B Visa Program**

The Immigration and Nationality Act (INA) of 1952 authorized an H-2 nonimmigrant visa category for foreign workers who are coming temporarily to the United States to perform services or labor for which United States workers cannot be located.<sup>1</sup> In 1986, the INA was amended and the H-2 visa program was subdivided into separate programs for agricultural (H-2A) and non-agricultural workers (H-2B).<sup>2</sup> The H-2B visa program allows an employer to hire a non-agricultural worker "having a residence in a foreign country which he has no intention of abandoning who is 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 . . . ."<sup>3</sup> The H-2B visa program is subject to a statutory annual cap of no more than 66,000 H-2B visa approvals per fiscal year.<sup>4</sup> This represents a small fraction of total nonfarm employment in the United States, which stood at 134 million at the end of 2012.<sup>5</sup>

In order to utilize the H-2B program, employers and prospective temporary foreign workers must navigate a complicated process that involves the United States Department of Labor (DOL), the appropriate state workforce agency, the United States Department of Homeland Security (DHS) and the United States Department of State (State Department). First, the employer must request a

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<sup>1</sup> Pub. L. No. 82-414, § 101(a)(15)(H)(ii), 66 Stat. 163, 168 (1952).

<sup>2</sup> Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359 (1986).

<sup>3</sup> 8 U.S.C. § 1101(a)(15)(H)(ii)(b).

<sup>4</sup> *Id.* at 1184(g)(1)(B). The annual allotment is split into two allocations of 33,000 visas for each half of the fiscal year. *Id.* at § 1184(g)(10). The visas are issued on a first-come, first-served basis beginning with the first allotment in October. The second allotment is available beginning in April.

<sup>5</sup> <http://data.bls.gov/timeseries/CES0000000001>.

prevailing wage determination from the DOL's National Prevailing Wage Center for the temporary or seasonal jobs it is seeking to fill.<sup>6</sup> Second, the employer must go through an intensive recruitment process to recruit United States workers for the jobs.<sup>7</sup> Third, if the employer is unable to find United States workers to fill the advertised jobs, then the employer may file an Application for Temporary Employment Certification with the DOL.<sup>8</sup> Fourth, if the employer's temporary labor certification application is approved, the employer can file an I-129 Petition for Nonimmigrant Worker with USCIS to admit a specified number of temporary foreign workers,<sup>9</sup> but such petitions are only accepted if the H-2B visa cap has not been reached.<sup>10</sup> Finally, after an employer's petition is approved, prospective workers must apply for an H-2B visa with the State Department at a United States embassy or consulate.<sup>11</sup>

The costs employers incur to use the H-2B program are not insignificant. Newspaper ads used to recruit United States workers cost on average \$600.<sup>12</sup> The filing fee for the I-129 petition is \$325, plus an additional \$150 for fraud prevention and detection. If the employer opts for premium processing, an additional \$1,225 additional fee is charged.<sup>13</sup> In addition, many employers hire companies to help them through the H-2B application process at a cost of \$3,000 to \$5,000.<sup>14</sup> Given the complex, time-consuming and costly process employers must go through in order to gain approval to bring foreign workers into the United States to fill temporary positions, one may wonder why employers utilize the H-2B visa program. It is to that subject that we now turn.

## II. The Importance of the H-2B Visa Program to Small Businesses

Small seasonal businesses rely on the H-2B visa program to supplement their local workforce when they cannot find United States workers to meet their needs. During their high seasons, small businesses may require a significant increase in their workforce. Businesses in the tourism, hotel and lodging, landscaping, groundskeeping, seafood processing, nursery and forestry operations, housing

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<sup>6</sup> 20 C.F.R. § 655.10. This then becomes the wage rate paid by employers to the temporary foreign workers.

<sup>7</sup> The recruitment process includes submitting the job to the state workforce agency serving the area of intended employment and publishing at least two print advertisements for the position, one of which must be on a Sunday. *Id.* at § 655.15(c). The employer must offer and advertise the position to all potential workers at a wage at least equal to the prevailing wage. *Id.* at § 655.10.

<sup>8</sup> The United States Citizen and Immigration Services (USCIS), the agency within DHS that adjudicates H-2B petitions, requires that the employer apply for and obtain a temporary labor certification from DOL before filing an H-2B petition. 8 C.F.R. § 214.2(h)(6)(iii)(A). A temporary labor certification is the DOL's advice to USCIS that qualified United States workers are not available and that the foreign workers employment will not adversely affect the wages or working conditions of similarly employed United States workers. *Id.* at § 214.2(h)(6)(iv)(A). Employers must establish that the need for foreign workers is temporary by showing that it is: 1) a one-time occurrence; 2) a seasonal need; 3) a peakload need; or 4) an intermittent need. *Id.* at § 214.2(h)(6)(ii)(B).

<sup>9</sup> *Id.* at § 214.2(h)(6)(iii)(C).

<sup>10</sup> <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=3566b6c521eb97210VgnVCM100000082ca60aRCRD&vgnnextchannel=d1d333e559274210VgnVCM100000082ca60aRCRD>.

<sup>11</sup> <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=d1d333e559274210VgnVCM100000082ca60aRCRD&vgnnextchannel=d1d333e559274210VgnVCM100000082ca60aRCRD>.

<sup>12</sup> *Examining the Role of Lower-Skilled Guest Worker Programs in Today's Economy: Hearing Before the Subcomm. On Workforce Protections of the H. Comm. on Education and the Workforce*, 113th Cong. (2013) [hereinafter Guest Worker Hearing] (joint statement of Sabeena Hickman and Michael V. Geary), available at <http://www.anla.org/docs/government%20relations/immigration%20and%20labor/Joint%20PLANET-ANLA%20H-2B%20testimony%203-13-13%20final.pdf>.

<sup>13</sup> Optional Checklist for Form I-129 H-2B Filings, USCIS Form M-1087, available at <http://www.uscis.gov/files/form/m-1087.pdf>.

<sup>14</sup> Guest Worker Hearing, *supra* note 12, statement of Sabeena Hickman and Michael Geary at 3.

construction, thoroughbred breeding and racing and restaurant industries historically have had a difficult time finding United States workers to fill temporary and seasonal positions when demand for labor spikes. Thus, the H-2B visa program is a legal and vital source of temporary labor.

The top ten H-2B worker positions that DOL has certified, to date, in 2013 are: landscaping and groundskeeping workers; maids and housekeeping cleaners; amusement and recreation attendants; forest and conservation workers; meat, poultry and fish cutters and trimmers; construction laborers; coaches and scouts; waiters and waitresses; nonfarm animal caretakers; and lifeguards, ski patrol and other recreational workers.<sup>15</sup> While the industries and types of positions that are seasonally driven vary, there are similarities in the job characteristics and requirements. The positions that these businesses seek to fill are lower-skilled, temporary and often physically demanding.

Businesses located in small, often rural, towns that rely heavily on tourism to sustain the local economy face special challenges. Although there is a small core, year-round population in these towns, the local population often cannot meet the seasonal hiring demands. United States workers are reluctant to relocate their families and incur moving costs for temporary, seasonal employment that is not likely to lead to a permanent position.

Given the inability to hire full-time workers, some tourism employers have tried to recruit college students to fill summer jobs, but there is often a mismatch between college students' summer breaks, which generally are from June to August and the businesses' summer seasons, which range from as early as April to as late as October or November.<sup>16</sup> Other employers have tried to hire from nearby economically depressed areas but have been unable to attract unemployed workers to fill temporary jobs that require relocation to resort towns where housing is costly and in short supply. Finally, some businesses simply face a shortage of a specific type of worker within a geographic area. For example, in Colorado, ski resorts use the H-2B program to bring in foreign ski instructors both because there is a shortage of certified ski instructors in Colorado and the resorts need instructors who are fluent in foreign languages to work with foreign resort guests.<sup>17</sup>

According to a survey of employers, the H-2B program benefits go beyond simply providing them with needed seasonal workers. The program provides a stable and reliable workforce. Many employers bring back the same H-2B workers each year, thereby reducing employers' training and turnover costs. Employers also have found that hiring H-2B workers allowed them to sustain and expand their businesses, which enables the employers to hire more United States workers, often for higher-skilled, permanent positions that pay well above minimum wage.<sup>18</sup>

### III. Recent Agency and Congressional Action

Since 2011, the DOL has promulgated several rules that would make changes to the H-2B program. In 2011, the DOL issued a rule to revise the methodology that it uses to calculate the prevailing wage

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<sup>15</sup> [http://www.foreignlaborcert.doleta.gov/pdf/h\\_2b\\_temp\\_non\\_agricultural\\_visa.pdf](http://www.foreignlaborcert.doleta.gov/pdf/h_2b_temp_non_agricultural_visa.pdf).

<sup>16</sup> Guest Worker Hearing, *supra* note 12, statement of R. Daniel Musser at 2, available at [http://edworkforce.house.gov/uploadedfiles/musser\\_testimony\\_etc.pdf](http://edworkforce.house.gov/uploadedfiles/musser_testimony_etc.pdf).

<sup>17</sup> Ed Sealover, *Ski Resorts, Hotels Struggle With Current Guest Visa System*, DENVER BUS. J., Apr. 19, 2013, available at <http://www.bizjournals.com/denver/print-edition/2013/04/19/ski-resorts-hotels-struggle-with.html?page=all>.

<sup>18</sup> UNITED STATES CHAMBER OF COMMERCE AND IMMIGRATIONWORKS USA, THE ECONOMIC IMPACT OF H-2B WORKERS 11-12 (Nov. 2010), available at <http://www.h2bworkforcecoalition.com/pdf/IWChamberH2BreportNov2010.pdf>.

rates (2011 Wage Methodology Rule).<sup>19</sup> The DOL estimated that the 2011 Wage Methodology Rule would result in the wages paid to H-2B workers increasing by \$1.23 to \$9.72 per hour.<sup>20</sup> Concern over the effects the wage increases would have on employers that use the H-2B program led Congress to block DOL's implementation of the 2011 Wage Methodology Rule through a series of appropriations riders, the most recent of which delayed the effective date until Oct. 1, 2013.<sup>21</sup>

More recently, DOL and DHS halted processing H-2B applications for a month due to a court decision that vacated parts of the prevailing wage rule under which the program had been operating.<sup>22</sup> Although DOL and DHS have resumed processing applications, the temporary cessation and demand has created a severe processing backlog.<sup>23</sup> In addition to the challenges small businesses face in getting H-2B workers into the United States for the 2013 summer season, DOL and DHS also have promulgated a rule that is similar to the 2011 Wage Methodology Rule and will impose increased costs upon small businesses that use the program.

#### IV. The 2013 Wage Methodology Rule

On April 24, 2013, DOL and DHS (the Departments) issued a joint interim final rule, effective immediately, that revises the methodology that DOL uses to calculate the prevailing wages to be paid to H-2B workers and United States workers recruited in connection with the temporary labor certification (2013 Wage Methodology Rule).<sup>24</sup> Beginning in 1998, prevailing wage determinations were based on the Bureau of Labor Statistics' Occupational Employment Statistics (OES) wage survey if the Davis-Bacon Act (DBA) or Service Contract Act (SCA) did not apply.<sup>25</sup> The OES survey, which produces employment and wage estimates for approximately 800 occupations, is published annually and provides data broken out both by geographic area and industry.<sup>26</sup> Since 2008, DOL has used a four-tier wage rate system based on OES wage data that reflected four "skill

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<sup>19</sup> Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, 76 Fed. Reg. 3,452 (Jan. 29, 2011).

<sup>20</sup> *Id.* at 3,476.

<sup>21</sup> Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. No. 113-6, 127 Stat. 198 (2013); Continuing Appropriations Resolution, 2013, Pub. L. No. 112-175, 126 Stat. 1313 (2012); Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, 125 Stat. 786, Div. F., Title I § 110 (2011); Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, 125 Stat. 552, Div. B, Title V, § 546 (2011).

<sup>22</sup> The rule was issued in response to a federal district court decision that vacated the 2008 regulation that DOL had used to calculate prevailing wages. *Comité de Apoyo a los Trabajadores Agrícolas v. Solis*, 2013 U.S. Dist. LEXIS 39175 (E.D. Pa.).

<sup>23</sup> Robert Gold, *H-2B Visa Processing Resumes With New Wage Rule*, CAPE COD TIMES, May 2, 2013, available at <http://www.capecodonline.com/apps/pbcs.dll/article?AID=/20130502/BIZ/305020305>.

<sup>24</sup> Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, Part 2, 78 Fed. Reg. 24,047 (Apr. 24, 2013). The Eleventh Circuit recently upheld a preliminary injunction against enforcement of another DOL H-2B rule because the court found that the plaintiffs were likely to prevail on their claims that DOL has no express authority to promulgate rules for the H-2B visa program. *Bayou Lawn and Landscape Serv's v. Solis*, 2013 U.S. App. LEXIS 6524 (11<sup>th</sup> Cir.). A discussion of the legality of the interim final rule is beyond the scope of this memorandum.

<sup>25</sup> 78 Fed. Reg. at 24,050. The DBA applies to contractors and subcontractors performing work on federally funded or assisted public buildings or public works under contracts in excess of \$2,000.

<http://www.dol.gov/whd/govcontracts/dbra.htm>. The SCA applies to all contractors and subcontractors performing services for the federal government or District of Columbia under contracts in excess of \$2,500.

<http://www.dol.gov/compliance/laws/comp-sca.htm>. Both Acts contain wage rate provisions.

<sup>26</sup> *Id.* The OES survey collects data for all occupations defined by the Office of Management and Budget's Standard Occupational Classification system. *Id.* at 24,051.

levels.”<sup>27</sup> The four-tiered wage system accounted for the different levels of skill within an occupation.<sup>28</sup> Small businesses were supportive of the four-tier system because it reflected the diversity of jobs, skills and experience levels in the various seasonal industries.<sup>29</sup>

Under the new methodology, the prevailing wage will simply be the overall OES mean of all persons in the occupation in question rather than a four-tier system.<sup>30</sup> As a consequence, prevailing wages will increase and no longer reflect the differences between wages for entry-level workers versus more experienced workers that may have additional responsibilities. The Departments estimate that the rule will increase wages for H-2B workers and similarly employed United States workers hired in response to the recruitment process, at most, by \$2.12 an hour.<sup>31</sup> Because it is effective immediately, the 2013 Wage Methodology rule applies to any wage determination requests and applications for temporary employment certification submitted on or after April 24, 2013 and H-2B work being performed on or after April 24, 2013.<sup>32</sup> Thus, small businesses that currently employ H-2B workers will receive supplemental prevailing wage determinations from DOL in the coming weeks and must pay the new wage to any H-2B workers that they currently employ.<sup>33</sup>

Because the rule was issued as an interim final rule under the good cause exception, the Departments were not required to comply with the Regulatory Flexibility Act. As a consequence, the Departments did not analyze the effects of the 2013 Wage Methodology Rule on small businesses. However, no analysis is required to realize that small businesses that have already set their summer seasonal rates or have contracts for the 2013 season may have little or no flexibility to increase their rates or prices to offset increased labor costs. In addition, a preliminary nationwide survey by the H-2B Workforce Coalition of H-2B employers shows that the prevailing wage increases under the new rule thus far are higher than the Departments’ \$2.12 estimate. It shows that on average, employers are facing an average increase of \$2.94 per hour which translates to an average increase of 32.3 percent in H-2B wage rates.<sup>34</sup>

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.* The four-tiered wage rate system for the H-2B visa program was based upon the system that Congress had mandated that DOL use to calculate wage rates for the H-1B visa program. *Id.* When a governmental survey is used to determine the prevailing wage, the survey is required to “provide at least 4 levels of wages commensurate with experience, education, and the level of supervision.” 8 U.S.C. § 1184(p)(4). The statute goes on to provide a formula for creating 4 levels when an existing governmental survey only has 2. *Id.*

<sup>29</sup> Letter from Winslow Sargeant, Ph.D., Chief Counsel for Advocacy, Small Business Administration (SBA) and Janis C. Reyes, Assistant Chief Counsel, SBA, to Hilda Solis, Secretary of Labor, DOL and Thomas Dowd, Administrator, Office of Policy Development and Research, DOL (Oct. 27, 2010), available at <http://www.sba.gov/sites/default/files/Letter%20dated%2010-27-10%20-%20Department%20of%20Labor,%20Employment%20and%20Training%20Administration.pdf>.

<sup>30</sup> The DOL will continue to use collective bargaining agreements as an alternative basis for determining the prevailing wage when applicable. 78 Fed. Reg. at 24,053. The DOL also will continue to permit an employer to use a prevailing wage determination based on the DBA or SCA but allows an employer to pay a higher wage than required under the DBA or SCA. *Id.* at 24,054. Independent wage surveys, subject to guidelines, may be used as well. *Id.* at 24,054-55.

<sup>31</sup> *Id.* at 24,058.

<sup>32</sup> *Id.* at 24,055.

<sup>33</sup> *Id.*

<sup>34</sup> H-2B Workforce Coalition, H-2B Final New Wage Rule Impacts By State (May 24, 2013) (on file with the Committee). The survey includes 283 prevailing wage determinations from across the nation. At the top end, one employer is facing a 111 percent wage increase with the prevailing wage rate going from \$7.96 to \$16.80 an hour.

It is not unreasonable to anticipate that the required wage increases are likely to have a domino effect on wages within a small business. In addition to being required to increase wages for their H-2B employees and United States employees that are similarly employed, employees with greater responsibilities, including management responsibilities, may expect or require wage increases. These mid-season wage increases are likely to have a significant impact on small seasonal businesses.<sup>35</sup> While DOL is not required to assess the economic impacts of the 2013 Wage Methodology Rule on small businesses, there is nothing that precludes DOL from conducting outreach to small businesses, assessing how the mid-season prevailing wage rate increase will affect small businesses in the short-term and long-run and considering whether immediately increasing labor costs on small businesses that utilize the H-2B program is ill-advised.

## **V. Conclusion**

The H-2B program allows small employers that cannot find United States workers to fill seasonal jobs to meet their employment needs with temporary, legal foreign workers. While the number of workers involved in the H-2B program is relatively small, it is heavily relied upon by small businesses that must considerably increase their workforce to meet seasonal business needs. The 2013 Wage Methodology Rule will immediately affect small businesses that rely on the H-2B program and may have a significant economic impact on small businesses that cannot increase their prices or rates to offset their increased labor costs.

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<sup>35</sup> Even without other wage reverberations, the increase in wage rates to H-2B visa employees alone may create problems for thousands of small businesses that operate on narrow cost margins.